No. 87-5449

Supreme Court, U.S.
FILED
SEP 11 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

WILLIAM ANDREWS,

Petitioner,

- v. -

KENNETH V. SHULSEN, Warden, Utah State Prison, and DAVID L. WILKENSEN, Attorney General of the State of Utah,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTIONS PRESENTED

1. Petitioner, a black nineteen-year-old, was sentenced to death for his role as an accomplice to an interracial murder. Both the state and federal courts refused to hold an evidentiary hearing on the claim he was denied his rights under the Eighth and Fourteenth Amendments, as a result of the exclusion of blacks from the jury, the jury's exposure to prejudicial media coverage and to manifestations of anti-black community sentiment (including a note saying "Hang the Niggers"), and the demonstrated inadequacy of the Utah statutory scheme to prevent discrimination against black defendants in capital sentencing.

Can a hearing be denied on such evidence that racial bias and community prejudice influenced a sentence of death?

2. The Utah Supreme Court found, on Petitioner's appeal, that he did not kill the victims of this crime and was not present when they were killed, but that he "significantly aided in triggering a milieu that ended in catastrophe and death ... knowing ... that it would most probably conclude as it did."

Does Tison v. Arizona, 107 S.Ct. 1276 (1987) require a remand to state court for a determination of petitioner's personal culpability under the appropriate constitutional standard?

3. The Utah statutory system under which Petitioner was sentenced to death has several unique features:

(1) It does not require consideration of any statutory aggravating circumstances, other than the elements of first degree murder, at the capital sentencing hearing;*

(2) It permits the death penalty to be imposed on general verdicts of "guilty" of first degree murder and "death" as punishment, without any written findings of aggravating circumstances or factors at any stage;

(3) It did not provide for any automatic judicial or appellate review of a death sentence imposed by a jury.

Does such a system comport with the Eighth Amendment, after Furman v. Georgia, 408 U.S. 238 (1972)?

4. The jury in Petitioner's case was given sentencing instructions which the Utah Supreme Court later held invalid, because they improperly permit "the death penalty [to] ... be imposed where there is substantial doubt whether it should be."

Does the Eighth Amendment permit a death sentence to be imposed despite such doubts?

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*In Lowenfield v. Phelps, No. 86-6867 certiorari has been granted to examine a death sentencing procedure which shares this feature.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner William Andrews respectfully prays that a writ of certiorari issue to review the judgment of the Tenth Circuit Court of Appeals in this case.

CITATION TO OPINION BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is reported as Andrews v. Shulsen, 802 F.2d 1256 (10th Cir. 1986), rehearing denied, __ F.2d __ (10th Cir. 1987), and is attached as Appendix A. The opinion of the United States District Court for the District of Utah is reported as Andrews v. Shulsen, 600 F. Supp. 408 (D. Utah 1984).

JURISDICTION

The decision of the Tenth Circuit Court of Appeals was rendered on October 6, 1986. A timely petition for rehearing was denied on June 8, 1987. See Appendix A-21.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Sixth Amendment to the Constitution of the United States, which provides in relevant part:

> "In all criminal prosecutions, the accused shall enjoy the right to ... trial ... by an impartial jury ..."

and the Eighth Amendment to the Constitution of the United States, which provides in relevant part:

> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted;"

and the Fourteenth Amendment to the Constitution of the United States, which provides in relevant part:

> "[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

It also involves the 1973 Utah capital sentencing statute, which is reproduced in full in Appendix B.

STATEMENT OF THE CASE

Petitioner William Andrews was convicted and sentenced to death on three counts of first-degree murder for his participation as a non-triggerman in killings committed during an armed robbery. The convictions and sentences of death were upheld by the Utah Supreme Court in State v. Andrews, 574 P.2d 709, 711 (Utah 1977), cert. denied, 439 U.S. 882 (1978). A petition for state post-conviction relief was denied, and that denial was affirmed in Andrews v. Morris, 607 P.2d 816 (Utah 1980), cert. denied, 449 U.S. 891 (1980). Petitioner thereafter filed the present habeas corpus proceeding in the United States District Court for the District of Utah, which denied relief without an evidentiary hearing in Andrews v. Shulsen, 600 F. Supp. 408 (D. Utah 1984). The Tenth Circuit affirmed in Andrews v. Shulsen, 802 F.2d 1256 (10th Cir. 1986), rehearing denied, ___ F.2d ___ (10th Cir. 1987).

The facts of the case were summarized by the Utah Supreme Court in the following manner:

> [Co-defendant Dale Pierre], Andrews and [co-defendant Keith] Roberts were airmen stationed at Hill Air Force Base, Utah. Stanley Walker, Michelle Ansley, Carol Naisbitt, Cortney Naisbitt (son of Carol Naisbitt), and Orren W. Walker, Jr. (father of Stanley Walker) were tied up, made to lie on the floor, and forced to drink liquid Drano on the evening of April 22, 1974, in the basement of the Hi-Fi Shop in Ogden, Utah, by [Pierre] in company with Andrews, who aided [Pierre] by pouring the caustic substance into a plastic cup for accomplishment of these violent acts. [Pierre] and Andrews both had hand guns and [Pierre] finally shot all of the victims in the head with either a .25 caliber or .38 caliber handgun, which caused the deaths, within a brief period of time during that April evening, of Stanley Walker, Michelle Ansley (who had also been raped by [Pierre] just before he shot her) and Carol Naisbitt ... [A]fter shooting [Orren Walker, Pierre] vehemently kicked a ball point pen into one of his ears and attempted to strangle him with a cord.

State v. Pierre, 572 P.2d 1338, 1343-44 (Utah 1977), cert. denied, 439 U.S. 882 (1978).

Orren Walker, who testified at trial, described petitioner as leaving the scene prior to the time when Pierre committed the rape and the killings. As the Utah Supreme Court related in summarizing this aspect of Mr. Walker's testimony:

> Walker ... revealed that [petitioner] ... asked Pierre in the basement of the Hi-Fi Shop, after Pierre had discharged his handgun (not at that time shooting anyone), "What did you do that for, man"; that [petitioner] was nervous and upset; that when Walker made no movement after being told by Pierre to administer the Drano to Michelle Ansley, Stanley Walker, and Cortney Naisbitt, [petitioner] said to Walker, "Man, there is a gun at your head"; that either before or after the administration of the Drano to the victims [petitioner] said: "I can't do it, I'm scared", though Walker stated that he did not know to what this remark of [petitioner's] referred; and that [petitioner], who left and returned to the basement on more than one occasion during the evening of April 22nd, was not observed firing any gun nor was he present when Michelle was raped and all the victims were shot.

State v. Andrews, supra, 574 P.2d at 709-10.

The evidence presented in the sentencing hearing was summarized as follows by the Utah Supreme Court:

> [Petitioner] was at the time of trial 20 years of age, was abandoned at birth by his father, left home when he was 10, committed a burglary at 15, went to the Job Corps thereafter, and committed auto theft while in the Job Corps (for which he was placed on probation). While in the United States Air Force, [he] failed to appear for a dental appointment, failed to report for duty, without authorization left a place of duty, and had a separation action from the Air Force commenced against him on the basis he was "minimal productive, and a limited potential airman".

State v. Andrews, supra, 574 P.2d at 710.

Additional pertinent facts will be presented as they relate to petitioner's various claims.

REASONS FOR GRANTING THE WRIT

I.

THIS CASE PRESENTS IMPORTANT QUESTIONS REGARDING THE RIGHT OF A PRISONER UNDER A SENTENCE OF DEATH TO PRESENT EVIDENCE SPECIFIC TO HIS OWN CASE, INDICATING THAT RACIAL CONSIDERATIONS AND COMMUNITY PREJUDICES INFLUENCED HIS SENTENCE OF DEATH.

Petitioner sought an evidentiary hearing in the District Court for the purpose of showing that the jury that condemned him to die was prejudiced by a number of factors, including the exclusion of blacks from the jury and the exposure of jurors to manifestations of anti-Black community sentiment (most significantly, a note saying "Hang the Niggers") and prejudicial media coverage prior to and during the trial (including articles that falsely described petitioner raising his fist in an apparent "Black Power" gesture, directed at one of the victims, after the verdict). See R. 1112-15, 1376. Petitioner also offered to prove that death sentences in Utah had been imposed, to a vastly disproportionate extent, on black defendants as opposed to white. Ibid.

The District Court first granted, then denied, this request for a hearing. Following initial briefing and argument, in which petitioner pointed out that no evidentiary hearing had ever been held in state court on these issues, the District Court granted an evidentiary hearing on some of them, allowing petitioner "to show specific jurors were improperly exposed to specific improper influences to the extent that it may be done without discovery directed at the jurors themselves." R. 540. However, shortly before the evidentiary hearing was scheduled to begin, the Utah Supreme Court issued a decision in State v. Wood, 648 P.2d 71 (Utah 1981) which dramatically altered the state's death sentencing standard. See Part IV, below. The District Court responded by first postponing the evidentiary hearing, R. 1028, and then directing petitioner's counsel to make an "appropriate application to the State Supreme Court based on State v. Wood." R. 1086-87. After petitioner did so, without success, see Andrews v. Morris, 677 P.2d 81 (Utah 1983), petitioner filed a Second Amended Petition in the District Court. R. 1092. However, the District Court then reversed its earlier decision to conduct an evidentiary hearing and summarily dismissed the petition on the merits. Andrews v. Shulsen, supra, 600 F.Supp. at 415-16, 426, 432. Its denial of an evidentiary hearing and dismissal of the petition were affirmed by the Tenth Circuit. Andrews v. Shulsen, supra, 802 F.2d at 1260, 1266, 1270, 1275.

Those decisions present a set of important issues regarding "the special seriousness with which [this Court has] view[ed] the risk of racial prejudice influencing a capital sentencing decision," Turner v. Murray, 106 S.Ct. 1683, 1688 n.8 (1986), and the need to insulate the death sentencing process from influences which can "inflame the jury and divert it from deciding a case on the relevant evidence concerning the crime and the defendant." Booth v. Maryland, 55 U.S.L.W. 4836, 4839 (U.S., June 16, 1987).

A. Important Issues Are Presented By The Summary Dismissal Of Petitioner's Claims That His Death Sentence Reflected Race-Prejudicing Influences And Inadequate Systemic Protections Against Racial Discrimination.

McCleskey v. Kemp, 107 S.Ct. 1756 (1987), rejected the argument that "a complex statistical study that indicates a risk that racial considerations enter into capital sentencing determinations proves that ... [a] capital sentence is unconstitutional under the Eighth or Fourteenth Amendment." Id. at 1761. The Court emphasized that McCleskey had "offer[ed] no evidence specific to his own case that would support an inference that racial considerations played a part in his sentence." Id. at 1766-67. He "relie[d] solely on the Baldus study," id. at 1767, and the Court held that study was "clearly insufficient to support an inference that any of the decisionmakers in McCleskey's case acted with discriminatory purpose," id. at 1769. The teaching of McCleskey is that in order "to prevail under the Equal Protection Clause, [a capital defendant] ... must prove that the decisionmakers in his case acted with discriminatory purpose." Id. at 1766. Petitioner was not allowed to do that.

(1) Petitioner Alleged Case-Specific Facts Showing That Race-Prejudicing Factors Affected The Selection Of The Jury And The Outlook Of The Jurors.

In the present case, petitioner sought an evidentiary hearing for the purpose of making precisely the type of showing demanded in McCleskey: a presentation of "evidence specific to his own case that would support an inference that racial considerations played a part in his sentence." Id. at 1766-67. Petitioner sought to show that race-prejudicing factors affected every stage of his trial, from jury selection to sentencing.

a. The Selection of a Racially Biased Jury.

This was a case in which all three defendants were black and strangers to the area, while all of the victims were white and members of the local community. The petition alleged, and offered to show in an evidentiary hearing, that "[t]he race of the defendants and victims was prominently mentioned in the local press and among the citizens of Davis and Weber County" [respectively, the county to which venue was transferred on the State's motion, and the county where the charges originated]. R. 1114.[1]

The petition also alleged and sought an evidentiary hearing to show that non-white jurors were excluded from the trial of this case by a jury selection system that barred the majority of non-white citizens of Davis and Weber counties,[2] and that the only black person called to sit on the jury was excused by the prosecutor, who employed a peremptory challenge to ensure that the jury would be all white. R. 1114.

Petitioner would have shown not only that the jury was exclusively caucasian, but that it was affected by religious convictions that were prejudicial to black persons. The petition alleged most of the jurors were members of the Church of Jesus Christ of the Latter Day Saints (the Mormon Church), and "[u]nder the doctrines of that church at the time of the defendant's trial, black people were not considered to be equal to white

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[1] A pretrial survey conducted by an expert retained by petitioner's co-defendant showed that the two facts about the case which were most widely known were that the defendants were not from the local community (86.6% of the respondents knew this) and that both defendants charged in the case were black (80.6% of the respondents knew this). See Sentiments Relating to the Hi-Fi Shop Case, St. R. 158 at 10.

[2] At the time of petitioner's trial, Utah jurors had to be taxpayers, selected from the "legal voters on the assessment rolls of the county." Former § 78-16-17, U.C.A. 1953. The vast majority of black residents of Davis County were not property owners "on the assessment rolls," partly because they were servicemen stationed at Hill Air Force Base.

people." R. 1113.[3] As this Court observed in Turner v. Murray, 106 S.Ct. 1683 (1986), "subtle, less consciously held racial attitudes could ... influence a juror's decision," and "a juror who believes that blacks are ... morally inferior might well be influenced by that belief in deciding whether petitioner's crime involved ... aggravating factors." Id. at 1687.

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[3] Until June, 1978 it was the official doctrine of the Mormon Church that blacks were excluded from its lay priesthood, which included virtually all other male members of the Church. See BRINGHURST, SAINTS, SLAVES, AND BLACKS (1981).

This doctrine was announced by Brigham Young--a Prophet of the Church and the first Governor of Utah--who taught that black skin was the mark of the curse visited on the biblical Cain, for killing Abel:

> I tell you, this people that are commonly called negroes are the children of the old Cain. I know they are, I know that they cannot bear rule in the preisthood [sic] for the curse upon them ....

Id. at 123, quoting Young's "Speech to the Joint Session of the Legislative Assembly," 5 January 1852; see also id. at 97, 99.

Later Mormon Church Presidents maintained this position unchanged for over 125 years. In 1907 the First Presidency of the Church adopted the position that "'[N]o one known to have in his veins Negro blood (it matters not how remote a degree)' could receive 'the blessings of the Temple of God.'" Id. at 148, quoting Richards, Record of Decisions by the Council of the First Presidency and the Twelve Apostles, no. 3 (1907). In 1949 the Church leadership reiterated this position, justifying it by reference to "the conduct of spirits in the premortal existence" and quoting Brigham Young as follows:

> Why are so many of the inhabitants of the earth cursed with a skin of blackness? It comes in consequence of their fathers rejecting the power of the holy priesthood, and the law of God. They will go down to death.

LDS First Presidency Statement of August 17, 1949.

In 1969, the Church defended this practice, ascribing it to "reasons we believe are known to God, but which He has not made fully known to man." LDS Church First Presidency Statement of December 15, 1969. This Statement quoted then-Church President David O. MacKay thus:

> "The seeming discrimination by the Church toward the Negro is not something which originated with man; but goes back to the beginning with God .... Revelation assures us that this plan antedates man's mortal existence extending back to man's pre-existent state."

Ibid. A poll commissioned by the Utah Law Enforcement Planning Agency in October, 1971, found that 70 percent of Utah Mormons supported the denial of the priesthood to blacks, and one third ascribed controversy about it to a "black conspiracy" to destroy the Church. New York Times, April 6, 1972, p. 20.

It was only in June, 1978--four years after petitioner's trial--that the Church announced a new "revelation ... confirmed that the long-promised day has come," and "all worthy male members of the church may be ordained to the priesthood without regard to race or color." LDS Church First Presidency Statement of June 8, 1978.

b. The Race-Prejudicing Influences During Trial.

Additionally, petitioner would have shown in an evidentiary hearing that the implicit racial biases of the jurors were exacerbated by incidents manifesting the racial sentiments of the community. Cardinal among these was the exposure of some or all of the jurors to a note saying "Hang the Niggers."

The record reflects only the most general facts regarding this incident. At lunch-time each day, the jurors were bused from the courthouse to a cafe, where the jurors ate together in a separate dining room. St. T. 2447. During one lunch period, a juror presented the bailiff with a napkin containing a stick figure hanging on a gallows, bearing the inscription "Hang the Niggers." St. T. 2449. The bailiff reported the incident to the trial judge, who, in turn, had counsel informed. St. T. 2451. The bailiff was sworn and questioned, but could provide little information about the source and distribution of the napkin, or its effect upon the jurors. He said "it is possible" one of the jurors drew the figure, "that much time could have elapsed" after the jurors entered the dining room. St. T. 2454. He testified that the jurors sitting adjacent to the juror who turned in the napkin must have seen the drawing, but he "couldn't say with any degree of certainty" how many others did. St. T. 2450. And aside from reporting that "some of the jurors" asked him "what the court may do about this," the bailiff was unable to report any "comments one way or the other about it" among the remaining jurors. St. T. 2450.

Petitioner's counsel moved for a mistrial, and alternatively for sequestration of the jury, as a result of this event. St. T. 2451. The court denied both motions after hearing the bailiff's testimony, without calling any of the jurors to the courtroom for questioning or a specific cautionary instruction. St. T. 2455. The court's only action was to give a general instruction to the

entire panel in vague language that did not specifically refer to the napkin incident.[4]

c. The Prejudicial Publicity Between Guilt and Sentencing.

At the conclusion of the guilt phase of the trial, the judge released the jurors into the community for five days until the commencement of the sentencing hearing, saying: "Sleep well. Your verdict is reasonable." St. T. 4114. During this five-day period, there was prejudicial media coverage of the case, including a false story that petitioner had directed a closed fist gesture at one of the surviving victims, after the verdict. St. T. 4120. As this Court has recognized, "[f]ear of blacks, which could easily be stirred up by ... violent facts of [a] ... crime, might incline a juror to favor the death penalty." Turner v. Murray, supra, 106 S.Ct. at 1687. Such fears and latent religious beliefs of black inferiority might well be "stirred up" even more by reports of black militancy and apparent "Black Power" salutes. However, again, when this false and prejudicial story was brought to the trial court's attention, no questions were put to the jurors and no special admonitions were given; the defendants' motion for a mistrial was simply summarily denied. St. T. 4121.

(2) Petitioner Proffered Facts Showing That The Utah Statutory Scheme Fails To Adequately Guard Against The Effects Of Case-Specific Race-Prejudicing Influences On The Jury.

In McCleskey, the statistics on racial patterns in capital sentencing were proffered as a basis, in and of itself, for finding discriminatory purpose on the part of the decisionmaker. In the present case, statistics on racial patterns in Utah

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[4]This was the trial court's entire admonition to the jury on this subject: "Occasionally some foolish person will try to communicate with you. Please disregard the communications from foolish persons and ignore the same. You understand what happened. Just ignore communications from foolish people." St. T. 2456-7.

capital sentencing are relevant to a different issue--an issue that was not raised, and therefore not ruled upon, in McCleskey: whether the Utah capital sentencing system contains adequate safeguards to prevent case-specific race-prejudicing factors, such as the ones in the present case, from tainting the jury and its verdict.[5]

In an evidentiary hearing, petitioner would have presented statistics showing that black capital defendants in Utah, and particularly black defendants who are charged with killing white victims, face a disproportionately high risk of conviction of murder and imposition of a death sentence. See R. 1112-3; Affidavit, Appendix E at 9-23. The evidence petitioner proffered was not as detailed as that submitted in McCleskey,[6] but the pattern it revealed was similar, with one significant exception: the disparities in Utah death sentencing primarily involve the race of the defendant, not just the victim. Petitioner would have shown that there is a statistically significant disparity based on the defendant's race in all Utah cases, with a gross death sentencing rate for blacks who kill whites 25 times as great as the death sentencing rate in white defendant cases. App. E at 9. His evidence showed that the pattern persists even after controlling for variables that might have affected the

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[5] The habeas corpus petition and motion for an evidentiary hearing, which were filed prior to this Court's decision in McCleskey, framed the allegations and proffers in the terms that were subsequently rejected in McCleskey. However, the facts alleged and the statistics offered bear no less pertinently upon the issue whether the Utah capital sentencing system possesses adequate safeguards against racial discrimination.

[6] Petitioner's counsel compiled data concerning Utah's capital sentencing patterns from: responses to questionnaires sent by the Utah Attorney General to local prosecutors, as part of the discovery process prepatory to the evidentiary hearing initially ordered by the District Court; information on homicides maintained by the Utah Department of Vital Statistics; F.B.I. Uniform Crime Reports Supplemental Homicide Reports; published case reports; and interviews of prosecutors and defense attorneys who litigated capital cases. App. E, 4-7.

sentencing in the present case.[7] Although the number of cases in the state of Utah was relatively small, most of these figures were statistically significant because the sentencing disparities based on the defendant's race were so large--indeed, petitioner offered to prove, greater than those in any other state.

This statistical and comparative evidence, while not sufficient by itself to show racial motivation in any specific case after McCleskey, would have persuasively demonstrated that the Utah capital sentencing scheme fails to guard effectively against case-specific race-prejudicing factors such as those that were prevalent in the present case.

(3) The Lower Courts Erred In Summarily Dismissing Petitioner's Claims Concerning The Race-Prejudicing Factors.

In McCleskey, this Court reaffirmed its earlier holdings prohibiting "a prosecutor's exercise [of] peremptory challenges on the basis of race ... [and] state efforts to exclude blacks from grand and petit juries." 107 S.Ct. at 1775 n.30. The Court moreover reaffirmed that:

> If the circumstances of a particular case indicate a significant likelihood that racial bias may influence a jury, the Constitution requires questioning as to such bias ... [I]n a capital sentencing hearing, a defendant convicted of interracial murder is entitled to such questioning without regard to the circumstances of the particular case.

Id. at 1776 n.30. In the present case, the circumstances indicating a potential for "racial bias ... influenc[ing] a jury"

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[7] For example, the data controlled for factors such as use of a firearm (black defendants' chance of death 24 times greater), victim and defendant not acquainted (60 times greater), felony circumstance (19 times greater), multiple victims (8 times greater), apparent torture of the victim (6 times greater), and apparent danger to others (12.5 times greater). See id. at 10-11, 17-19.

Petitioner also would have presented a detailed comparison between the facts of this case and the facts of other Utah capital cases, and would have shown thereby that in cases involving white defendants, facts comparable to those in the present case (and even facts more extreme than those in the present case) have not produced a sentence of death. See id. at 26-29.

were manifestly strong enough to warrant an evidentiary hearing to explore "such bias," especially under the more protective standard applied to "capital sentencing hearing[s] [in which] ... a defendant [is] convicted of interracial murder." Id.

Petitioner's allegations that the prosecutor had used the peremptory challenge to produce an all-white jury warranted a hearing under the standard established in Batson v. Kentucky, 106 S.Ct. 1712 (1986). His allegations of race-biasing aspects of the local jury selection system warranted a hearing under Vasquez v. Hillary, 474 U.S. 254 (1986). His allegations that the jury was composed primarily of members of a religious group that deemed blacks to be morally inferior to whites sufficed to indicate a likelihood of racial bias that should have been explored. Cf. Turner v. Murray, supra, 106 S.Ct. at 1687-1688. Finally, and perhaps most important of all, the jury's exposure to the "Hang the Niggers" note and its potential exposure to prejudicial media coverage and community attitude just before the sentencing hearing, necessitated a questioning of the jurors that the state trial court never conducted. Cf. Batson v. Kentucky, supra, 106 S.Ct. at 1721-24; Turner v. Murray, supra, 106 S.Ct. at 1688; Ristaino v. Ross, 424 U.S. 589, 596-97 (1976).[8]

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[8] As a matter of due process, in cases in which a juror has been exposed to an "extraneous influence" (Mattox v. United States, 146 U.S. 140, 149 (1892)), "[t]his Court has long held that the remedy for allegations of juror partiality is a hearing in which the defendant has the opportunity to prove actual bias." Smith v. Phillips, 455 U.S. 209, 215 (1982); accord, Tanner v. United States, 55 U.S.L.W. 4942, 4946 (U.S., June 22, 1987); Remmer v. United States, 347 U.S. 227 (1954). The note and the false press reports in this case were clearly the type of "extraneous influence" that would bring the case within "[t]he Court's holdings requiring an evidentiary hearing where [an] extrinsic influence ... [has] tainted the deliberations." Tanner v. United States, supra, 55 U.S.L.W. at 4946. Accordingly, petitioner had a right to an evidentiary hearing on the biasing effect of these influences, and to examine the jurors who had been exposed to them concerning the effect they had. See Smith v. Phillips, supra, 455 U.S. at 217 n.7 ("determinations made in Remmer-type hearings will frequently turn upon testimony of the juror in question").

In Turner v. Murray, supra, this Court observed that "[o]nce rhetoric is put aside, it is plain that there is some risk of racial prejudice influencing a jury whenever there is a crime involving inter-racial violence ...; the only question is at what point that risk becomes constitutionally unacceptable." 106 S.Ct. at 1688 n.8. The courts below denied petitioner the opportunity to show that point was reached in this case. Certiorari should be granted to determine if that was proper.

B. The Lower Courts' Summary Dismissal Of Petitioner's Claim That Prejudicial Publicity And Inflamed Community Sentiment Impaired The Jurors' Ability To Be Fair And Impartial Also Presents Issues Deserving Review.

In addition to seeking an evidentiary hearing to show that the jury was influenced by race-biasing factors, petitioner sought to present evidence showing that prejudicial media coverage and manifestations of a hostile community atmosphere combined to impair his due process and Sixth Amendment rights to "receive a trial by an impartial jury free from outside influences." Sheppard v. Maxwell, 384 U.S. 333, 362 (1966).

Prior to trial, defense counsel moved for a change of venue from Weber County to Salt Lake County, on the basis of extensive prejudicial publicity. A survey showed that 91.7 % of the residents of Weber County had heard of the crime, and 93.2 % of those felt that the defendants were guilty. See St. R. 158. Notwithstanding the lack of any evidence--or any finding by the trial court--that a fair trial would be possible in adjacent Davis County, the trial judge granted the prosecution's factually unsubtantiated motion to move the trial there. See St. R. 148; St. T. (hearing of August 5, 1974), at 12, 16. On the day of trial in Davis County, defense counsel reported to the court that:

> More than a fourth of the potential jury venire members have called up and indicated they don't desire to serve, that there have been threatening letters filed, that there have been indications of a great many people signing petitions that they desire to dispatch the defendants somewhere between here and the Mountain Road.

St. T. 11. The extensive publicity and community pressure that prevailed in Davis County is evidenced by the voir dire. As counsel for petitioner pointed out to the District Court in his Memorandum in support of an evidentiary hearing:

> Juror after juror testified the community was "up in arms" (Tr. 868), that "when they had caught the ones that did it" they wanted "to hang the people right there" (Tr. 684B), that their co-workers said the people that committed the crimes should be "caught and prosecuted and put to death" (Tr. 401), that the case was the "number one topic of conversation" (Tr. 427, 915, 1114), that "everybody said they were guilty" and "they don't deserve a trial" (Tr. 1010), "I think they want to get it over and done with," "I think they want to just hang them" (Tr. 498, 1116, 1185, 1258. Several prospective jurors said that, when they were called for jury duty, friends and family members "attempted to tell me what I should do since they knew I was selected" (Tr. 787), or told them the defendants "were guilty and should be executed" (Tr. 1049-50), or "what they would do if they were on the jury" (Tr. 880), or just said they "should vote guilty" (Tr. 542).

R. 718.

The voir dire demonstrates that the effects of the prejudicial publicity and community sentiment reached the venirepersons who were selected as jurors in the case. All the empaneled jurors had heard or read about the case. One had been told by friends and relatives that the defendants "should be punished to a severe degree." St. T. 773. Another said he was aware that the "general feeling in the community was that they should receive capital punishment." St. T. 785. Another said he was "aware of a general public feeling, I would say of guilt." St. T. 1242. Another had been told by his wife that she believed the defendants were guilty and "right justice should be done," St. T. 380, and said if he were to return a verdict in favor of the defendants he would feel compelled to explain this to her. St. T. 380-81. Others simply said more generally that they were aware of the "public feeling" surrounding the case, St. T. 761, or had "heard talk" (St. T. 523). Yet another said that "most

people I have talked to and have been exposed to, feel that it is guilty, and that is the sentiment of the people," St. T. 1289, admitted that he himself had expressed an opinion that "based upon what I have heard, they are guilty, and I think they ought to be taken out and hanged or words to that effect," St. T. 1287, and said his feelings "hadn't changed," St. T. 1301.

The pressures on the jury continued throughout the trial. As petitioner would have shown in an evidentiary hearing, there was a "carnival atmosphere at trial ... [caused by] [t]he number of reporters in the courtroom ... [and] the conduct of newsmen in the courtroom." Sheppard v. Maxwell, supra, 384 U.S. at 358. Petitioner proffered that he would present evidence showing that "spectators and news reporters packed the courtroom, news crews maintained a constant vigil outside in its corridors." R. 362.

In the midst of a trial so beleaguered with spectators and journalists and so much the focus of community attention, a juror received the "Hang the Niggers" note described earlier. The record does not reflect how many jurors actually saw the note, or what effect it had on them, because the trial judge would not question the jurors or permit questioning by defense counsel and the District Court denied an evidentiary hearing on this issue.

Also as described earlier, at the conclusion of the guilt phase, the judge assured the jurors that their verdict had been "reasonable" and then, in disregard for the extensive publicity and community pressure surrounding this case and over the objections of defense counsel, released the jurors for five days prior to the sentencing hearing. St. T. 4114-5. It was during this period that the local media carried false and prejudicial accounts including the false story that the petitioner had directed a clenched fist gesture at the key prosecution witness after the verdict on guilt. St. T. 4120-1. Again, a mistrial was denied at that point without any further inquiry or admonition by the trial judge. Ibid.

Petitioner's claims that "the state trial judge did not fulfill his duty to protect [petitioner] ... from the inherently prejudicial publicity which saturated the community and to control disruptive influences in the courtroom", Sheppard v. Maxwell, supra, 384 U.S. at 363, warranted, at the very least, an evidentiary hearing in which petitioner could show the precise nature of the prejudicial influences and the extent to which they actually affected the jury. Because these influences surrounded a capital sentencing hearing, the logic of this Court's decision in Turner v. Murray, supra, calls for particular caution in ensuring that the sentencing jury was not affected by the prejudicial publicity and community presures. As the Court recognized in Turner, capital sentencing proceedings are particularly susceptible to being swayed by prejudice and irrationality. 106 S.Ct. at 1685-86. "[T]he decisions that sentencing jurors must make involve far more subjective judgments than when they are deciding guilt or innocence." Id. at 1689 n.12. This is particularly true in a state like Utah, where the jury possesses vast discretion in choosing the factors that it will deem aggravating. See Part III, below; compare Turner v. Murray, supra, 107 S.Ct. at 1687.

In a case such as the present one--in which no court, state or federal, has ever questioned the jurors about their exposure to these influences, or heard the evidence that petitioner has sought to proffer--"the special seriousness" (id. at 1688 n.8) of allegations of prejudice in capital sentencing compels at least an evidentiary inquiry into the extraneous forces that bore upon the jurors who sentenced William Andrews to die.

II.

THE DECISION OF THIS COURT IN TISON V. ARIZONA, 107 S.CT. 1676 (1987) REQUIRES THAT THIS CASE BE SENT BACK TO THE UTAH COURTS FOR A DETERMINATION OF PETITIONER'S INDIVIDUAL CULPABILITY UNDER THE APPROPRIATE CONSTITUTIONAL STANDARD.

In Tison v. Arizona, 107 S.Ct. 1676 (1987), this Court held that "the Arizona Supreme Court applied an erroneous standard in making the findings required by Enmund v. Florida." 107 S.Ct. at 1678. The Arizona Supreme Court had ruled that a defendant can be deemed to possess the requisite "intent to kill" if he "'played an active part'" in a criminal venture and "'could anticipate ... [a co-perpetrator's] use of lethal force'" during the course of that venture. Id. at 1681. Although concluding that "major participation in [a] ... felony ..., combined with reckless indifference to human life, is sufficient to satisfy the Enmund culpability requirement," id. at 1688, the Court insisted that state courts must find both of these elements to uphold a death sentence. Ibid. The Court recognized that the facts of Tison "would clearly support a finding that [the Tisons] ... subjectively appreciated that their acts were likely to result in the taking of innocent life," id. at 1685, but instead of making such a finding the Arizona Supreme Court had "attempted to reformulate 'intent to kill' as a species of foreseeability," id. at 1684. That was not entirely impermissible, but neither was it sufficiently precise to pass constitutional muster. Accordingly, this Court vacated and remanded so that the state courts could make the necessary Enmund determination under an appropriate standard.

In the present case, the Utah Supreme Court applied a standard that is essentially identical to the erroneous standard employed by the Arizona Supreme Court in Tison. In concluding that petitioner's death sentence was not disproportionate to the crime, the Utah Supreme Court explained:

> Defendant's complicity in these murders was deep; his actions bold and gross. He indeed significantly aided in triggering a milieu that ended in catastrophe and death -- and did so knowing at the beginning of this episode of terror that it would most probably conclude as it did.

State v. Andrews, supra, 574 P.2d at 711. The Utah Supreme Court's focus on what petitioner foresaw as the "most probabl[e]" outcome of events is equivalent to the Arizona Supreme Court's focus on "foreseeability": "the possibility of bloodshed is inherent in the commission of any violent felony and this possibility is generally foreseeable and foreseen." Tison v. Arizona, supra, 107 S.Ct. at 1684.

Moreover, the objective facts bearing upon petitioner's level of culpability are far more equivocal than in Tison. Like the Tisons, petitioner was armed with a pistol during the commission of the crime and provided one of the vehicles used. State v. Pierre, supra, 572 P.2d at 1343-44. But unlike the Tisons, who were "physically present during the entire sequence of criminal activity culminating in the murder of the Lyons family," Tison v. Arizona, 107 S.Ct. at 1688, petitioner was not "present when Michelle was raped and all the victims were shot." State v. Andrews, supra, 574 P.2d at 710. Whereas the Tisons never "made an effort to help the victims" and merely claimed after the fact that "they were surprised by the shooting", Tison v. Arizona, 107 S.Ct. at 1679, petitioner on several occasions protested his co-perpetrators' violent behavior. As one of the victims described at trial:

> [petitioner] asked Pierre in the basement of the Hi-Fi Shop, after Pierre had discharged his hand gun (not at that time shooting anyone), "What did you do that for, man?"; ... [petitioner] was nervous and upset ... [and] either before or after the administration of the Drano ... said "I can't do it, I'm scared."

State v. Andrews, supra, 574 P.2d at 709. Whereas Raymond Tison "[b]y his own admission ... was prepared to kill in furtherance of the prison break" and handed over an "arsenal of lethal

weapons ... to two convicted murderers, one of whom he knew had killed a prison guard in the course of a previous escape attempt", Tison v. Arizona, 107 S.Ct. at 1684-85, there was no evidence that petitioner knew in advance that any of his co-perpetrators planned to kill during the robbery, or had killed under similar circumstances in the past.[9]

In rejecting petitioner's Enmund claim, the Tenth Circuit held that this case falls within the hypothetical envisioned by this Court in Cabana v. Bullock, 106 S.Ct. 689, 700 n.6 (1986), "in which the theory on which the case was tried and the evidence received leave no doubt that the jury's verdict rested on a finding that the defendant killed or intended to kill." See Andrews v. Shulsen, supra, 802 F.2d at 1272. The Tenth Circuit engaged in a complex analysis of the lengthy jury instructions to support its conclusion that the jury verdict rested on a finding of intent to kill, id. at 1272-75, which cannot be squared with this Court's post-Enmund decisions.

When this Court in Cabana v. Bullock described the exception for cases in which the jury clearly found intent to kill, the Court used as an example a case in which "a defendant conceded that he committed the killing and defended against the charge of murder only by claiming self-defense." 106 S.Ct. at 700 n.6. This exception cannot apply to a case such as the present one, where the petitioner did not in any way participate in the killing and where an intent to kill, far from being implicit in

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[9] There was testimony that petitioner had made a statement some time before the crime indicating that "he would like to rob a hi-fi shop and would kill anyone who got in his way." State v. Pierre, supra, 572 P.2d at 1343. The exact language reported by the prosecution's witness, George Platco, was: "one of these days I would like to rob a hi-fi shop and if anybody gets in my way I would kill them." State Transcript [hereafter "St. T."] 1549. There was substantial reason to doubt Platco's credibility. See St. T. 1551-56, 3682-83. But, even if his account had been accurate and if the words he reported were not simply an empty boast, petitioner's behavior inside the hi-fi store demonstrated that at the time of the crime, he did not intend to kill anyone who got "in [his] way."

the defendant's own version of the facts, is inferred only from the "foreseeability" of the co-perpetrator's commission of the killing. That is amply demonstrated by this Court's refusal to apply the exception in the Tison case.[10]

At the time that the Court of Appeals decided petitioner's claim that his lack of an intent of kill required reversal of his death sentence under Enmund v. Florida, 458 U.S. 782 (1982), it did not have the benefit of this Court's decision in Tison. Since the facts in this case show a level of culpability no greater than that in Tison, and since the Utah Supreme Court assessed these facts under virtually the same erroneous standard employed by the Arizona Supreme Court in Tison, this Court's holding in Tison compels the vacating of petitioner's death sentence and the return of the case to the Utah courts to appraise the record under the proper constitutional standard in the first instance.

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[10] Moreover, the Tenth Circuit's highly technical analysis ignored other plausible readings of the jury instructions, and overlooked the crucial role of the prosecutor's arguments. The prosecutor argued extensively to the jury that it could convict petitioner of capital murder simply on the basis of an intent to "help the murderer escape" in conjunction with a failure to effectively withdraw from the crime by "completely destroy[ing] the effectiveness of his contribution to the commission of the crime." St. T. 3815, 4092-94. Even assuming arguendo that the jury instructions could be read in conjunction as requiring the jury to find intent to kill, the complexity of the instructions (see Cabana, supra, 106 S.Ct. at 695-96 n.2) "[i]n combination with ... the comments of the prosecutor ... create a 'legitimate basis for finding ambiguity concerning the factors actually considered by the' jury," California v. Brown, 107 S.Ct. 837, 842 (1987) (O'Connor, J., concurring).

Finally, in Enmund itself the state trial court (which was there the ultimate sentencer) had made explicit factual findings that Enmund was the triggerman (458 U.S. at 786-87 n.2), but this Court held that they could not save Enmund's death sentence since its approval by the Florida Supreme Court had rested upon the view that such findings were not necessary to support a constitutional death sentence. Ibid. Here too, the theory upon which the Utah Supreme Court upheld petitioner's death sentence did not endorse the notion that a finding of intent to kill had been made at the trial level but rested upon a broader ground that makes any implied jury findings based upon an exegesis of the jury charge "irrelevant to the constitutional issue." Ibid.

III.

THIS CASE PRESENTS AN INSTRUCTIVE VARIANT OF THE IMPORTANT ISSUE ON WHICH CERTIORARI HAS RECENTLY BEEN GRANTED IN LOWENFIELD v. BUTLER: WHETHER A DEATH SENTENCE CAN CONSTITUTIONALLY BE IMPOSED WITH NO FINDING OR CONSIDERATION OF ANY AGGRAVATING CIRCUMSTANCES OTHER THAN THE ELEMENTS THAT DEFINE THE CRIME OF CAPITAL MURDER

In Lowenfield v. Butler, No. 86-6867 (cert. granted, 55 U.S.L.W. 3852 (June 22, 1987)), this Court granted certiorari for the purpose of determining, inter alia, whether a sentencing scheme that permits a death sentence to be based on "a sole statutory aggravating circumstance that merely repeats an element of the crime, violates the Eighth Amendment requirement that sentencer discretion be directed and limited so as to minimize the risk of arbitrary and capricious executions." Lowenfield v. Butler, Petition for a Writ of Certiorari, Question Presented #2.

Like the Louisiana statute at issue in Lowenfield, the Utah capital sentencing statute permits a death sentence to be imposed upon consideration of aggravating factors that do no more than repeat elements of the crime. Under Utah law, first-degree murder, "a capital offense" (Utah Code Ann. § 76-5-202(2)), is defined as "intentionally or knowingly caus[ing] the death of another" under any one of a roster of enumerated circumstances. Utah Code Ann. § 76-5-202(1).[11] The statute does not designate any specific "aggravating circumstances" to be considered by the jury in deciding which persons convicted of capital murder will be sentenced to death, except in Utah Code § 76-3-207, which declares that in capital sentencing hearings, "[a]ggravating circumstances shall include those as outlined in 76-5-202," the statute listing the elements of first-degree murder.[12]

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[11] The version of the statute that was in effect at the time of petitioner's trial and sentencing hearing has been amended. The amendments, which are reflected in Appendix B, do not in any way affect petitioner's case.

[12] The only other statutory reference to aggravating factors is in the statute's explanation of the range of evidence that may be presented in a capital sentencing hearing. The statute states

Thus, Utah law expressly authorizes the jury to decide that a defendant who has been convicted of capital murder deserves a sentence of death, without finding or considering any circumstance other than that the defendant committed the capital murder. A single statutory circumstance like "homicide ... committed for ... personal gain" (Utah Code Ann. §76-5-202(1)(f)) can both elevate a killing to capital murder and thereafter serve as the sole predicate for imposing a sentence of death.

The effect of this statutory scheme is well illustrated in the present case. At the guilt phase of petitioner's trial, the jury returned three general verdicts of first-degree murder, which did not in any way indicate the statutorily enumerated circumstances upon which the jury relied. See St. R. 345.[13] In the sentencing hearing, the jury merely checked the line on the verdict form that stated: "[t]he defendant is sentenced to death". St. R. 419, see App. D-2. The only guidance which petitioner's sentencing jury ever received with respect to the concept of aggravation occurred during the guilt phase, when the court defined the statutory elements of first-degree murder. During the sentencing hearing, the sole instruction to the jury concerning aggravating circumstances was: "You may consider ...

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that: "evidence may be presented as to any matter the court deems relevant to sentence, including but not limited to the nature and circumstances of the crime, the defendant's character, background, history, mental and physical condition, and any other facts in aggravation or mitigation of the penalty." Utah Code Ann. § 76-3-207(1) (1973).

[13] The jury was instructed that "[t]he killing would be considered first degree murder if it was committed under any of the following circumstances: A. ... the defendant ... did kill or was a party to the killing of an additional person ... [see Utah Code Ann. § 76-5-202(1)(b) (1973)]; B. ... the killer intentionally created a great risk of death to others than the victims and himself [see Utah Code Ann. § 76-5-202(1)(c) (1973)]; C. [t]he killing was in perpetration of a robbery [see Utah Code Ann. § 76-5-202(1)(d) (1973)]; D. [t]he killing was in perpetration of rape [see Utah Code Ann. § 76-5-202(1)(d) (1973)]; E. [t]he killing was for ... pecuniary gain [see Utah Code Ann. § 76-5-202(1)(f) (1973)]; F. [t]he killing was for personal gain [see Utah Code Ann. § 76-5-202(1)(f) (1973)]". State Record [hereafter "St. R."] 351-52.

[a]ny factor in ... aggravation that would be considered by a responsible person making such a decision in an appropriate manner." St. R. 413-4, App. C-3-4.[14] The judge left it to the jurors to "consider all evidence received ... during the trial itself ... which is helpful to the jury in determining what the sentence should be." St. R. 413, App. C-4.

In short, the jury was not required to report what if any factors in aggravation it may have found or considered--at either stage of trial--and the instructions allowed it to sentence petitioner to death without finding or attending to a single fact or circumstance that went beyond the minimum elements of the offense sufficient to warrant a conviction.

This Court has said that "[a] capital sentencing scheme must ... provide a 'meaningful basis for distinguishing the few cases in which [the penalty] is imposed from the many cases in which it is not.'" Godfrey v. Georgia, 446 U.S. 420, 427-28 (1980) (quoting Furman v. Georgia, 408 U.S. 238, 313 (1972) (White, J., concurring)). The very purpose of aggravating circumstances in capital sentencing is to "genuinely narrow the class of persons eligible for the death penalty and ... reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." Zant v. Stephens, 462 U.S. 862, 877 (1983). When, as in the Utah capital sentencing scheme, any factor that renders a homicide "capital murder" also suffices to support the imposition of the sentence of death upon an individual convicted of capital murder, the sentencing scheme fails to "genuinely narrow the class of persons eligible for the death penalty." Ibid.

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[14] The jury instructions contained a set of factors that the jury "may consider", which were not designated as either aggravating or mitigating. Ibid. A comparison of this portion of the instructions and the statute reveals quite clearly, however, that these are the factors designated by the state legislature as "[m]itigating circumstances." Utah Code Ann. §76-3-207(1) (1973).

Like the decision in Lowenfield, the decision of the Tenth Circuit upholding this sentencing scheme is in direct conflict with decisions of the Eighth Circuit which have repeatedly invalidated death sentences based upon a statutory scheme that allows the same factor to serve as the basis for both a conviction of capital murder and the imposition of a sentence of death. See Collins v. Lockhart, 754 F.2d 258, 263-65 (8th Cir. 1985), cert. denied, 106 S. Ct. 546 (1985); Woodard v. Sargent, 806 F.2d 153, 155-57 (8th Cir. 1986); Ruiz v. Lockhart, 806 F.2d 158, 160-61 (8th Cir. 1986). Certiorari is warranted by this conflict between the circuits.

At the very least, petitioner's case should be held for decision in the light of Lowenfield v. Butler, supra. However, granting certiorari at this time and setting the present case for argument with Lowenfield would serve to further illuminate the issues presented there. The remainder of the statutory scheme under which petitioner was sentenced to death failed to correct--indeed, exacerbated--the discontrol permitted by the statute's lack of any aggravating circumstances apart from the elements of the capital crime.

Utah's death penalty statutes do not appear distinguishable in any relevant respect from several state laws held unconstitutional by this Court in the wake of Furman.[15] They include none of the mechanisms that this Court, in prior reviews of statutory schemes for jury capital sentencing, has characterized as furthering the goal of "'channel[ing] the sentencing decision patterns of juries'" and avoiding the "'pattern of arbitrary and capricious sentencing . . . found unconstitutional in Furman.'" Zant v. Stephens, 462 U.S. 862,

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[15] See, e.g., Moore v. Illinois, 408 U.S. 786 (1972) [see former Ill. Ann. Stat. Chap. 38 § 1-7(G) (1965)]; Davis v. Connecticut, 408 U.S. 935 (1972) [see former Conn. Gen. Stats. Ann. § 53-10 (1967)]; Scoleri v. Pennsylvania, 408 U.S. 939, rehearing denied 409 U.S. 897 (1972) [see former 18 Pa. Stat. Ann. § 4107 (1965)].

877 (1983). In addition to its failure to "narrow the class of persons eligible for the death penalty" (ibid.), the Utah statute lacks any requirement that "the jury . . . find at least one valid statutory aggravating circumstance and . . . identify it in writing", id. at 876. See also Pulley v. Harris, 465 U.S. 37, 51 (1984); Jurek v. Texas, 428 U.S. 262, 267, 269 & n.5 (1976). Nor does it contain any provision for the trial judge to make an "'independent determination as to whether the weight of the evidence supports the jury's findings and verdicts'", Pulley v. Harris, supra, 465 U.S. at 52, or even a mandatory system of appellate review of "every death penalty proceeding", Zant v. Stephens, supra, 462 U.S. at 876; Pulley v. Harris, supra, 465 U.S. at 53.[16]

By considering this case together with Lowenfield, the Court would thus have before it varying statutory schemes presenting a common problem under Furman, one of which presents in fully rounded form the essential question Lowenfield poses: how "discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action" in capital sentencing. Gregg v. Georgia, 428 U.S. 153, 189 (1976).

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[16]Although the Utah statute presently provides for automatic appellate review in all capital cases, Utah Code Ann. §76-3-206(2) (1978), the provision requiring such review was added in 1977, well after petitioner's trial and sentencing. See Compiler's Note to Utah Code Ann. § 76-3-206 (1978). Prior to that time there was no automatic appeal, even on legal issues, in capital cases. See Gilmore v. Utah, 429 U.S. 1012 (1976). Similarly, although the Utah Supreme Court has said it would construe the statute to require proportionality review in capital cases, it said that after sentencing in this case--indeed, on the appeal of petitioner's co-defendant. See State v. Pierre, supra, 572 P.2d at 1345 & n.9, 1346. There is no statutory authority for any such proportionality review, and it is unclear what it entails: the Utah Court has never purported to compare the sentences imposed in different cases to determine proportionality, and has never reversed a death sentence for any reason other than legal error.

IV.

THIS CASE PRESENTS THE UNRESOLVED QUESTION WHETHER THE EIGHTH AMENDMENT PRECLUDES THE IMPOSITION OF A DEATH SENTENCE DESPITE SUBSTANTIAL DOUBTS AS TO ITS APPROPRIATENESS UNDER THE APPLICABLE STATUTORY STANDARD.

In State v. Wood, 648 P.2d 71 (Utah 1981), the Utah Supreme Court "reject[ed] the proposition that the death penalty may be imposed where there is substantial doubt whether it should be," id. at 80, and held that, before a defendant is sentenced to death the sentencer must find, beyond a reasonable doubt, that the applicable statutory standard has been met. Id. at 83. The Utah Court's reasoning in reaching this conclusion drew heavily on this Court's Eighth Amendment death penalty jurisprudence, and the principles of In re Winship, 397 U.S. 358 (1970), requiring adherence to the reasonable doubt standard in criminal cases.

> Nowhere in the law is the interplay of procedural rules and substantive standards more critical than in the penalty phase of a capital case. Substantive standards must be "objective standards to guide, regularize and make rationally reviewable the process for imposing a sentence of death. Woodson, 428 U.S. at 303, 96 S.Ct. at 2991. It makes no difference, however, how rational and discriminating the dispositive substantive standards are, if the procedural rules which implement those standards do not provide an effective mechanism for their faithful implementation. Even if Solomon-like wisdom were available in framing objective standards, their whole purpose could be thwarted if the governing procedural rules allowed the sentencing body to impose the death penalty in the face of evidence which creates a reasonable or substantial doubt as to the appropriateness of the penalty.
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> In all litigation, both civil and criminal, there is always the possibility of error. Spicer v. Randall, 357 U.S. 513, 78 S.Ct. 1332, 2 L.Ed.2d 1460 (1958). ... "The reasonable doubt standard plays a vital role in the American scheme of criminal procedure. It is a primary instrument for reducing the risk of convictions resting on factual error. The standard provides concrete substance for the presumption of innocence--that bedrock 'axiomatic and elementary' principle whose 'enforcement lies at the foundation of the administration of our criminal law.'" [In re Winship, 397 U.S. 358, 363 (1970).]

648 P.2d at 81-2.

> To impose the death penalty, notwithstanding, serious doubts as to its appropriateness, would create in some cases--as in this case--a substantial possibility of "arbitrary ... treatment" and permit "penalties which are [not] proportionate," a result that is forbidden by the legislature and that would raise issues of a possible constitutional magnitude."

648 P.2d at 83.

To effectuate this holding the court in Wood required the following instruction to be given to capital sentencing juries:

> After considering the totality of the aggravating and mitigating circumstances, you must be persuaded beyond a reasonable doubt that total aggravation outweighs total mitigation, and you must further be persuaded, beyond a reasonable doubt, that the imposition of the death penalty is justified and appropriate in the circumstances.

648 P.2d at 83.

Petitioner's trial was the first held under the 1973 Utah death sentencing law, and occurred several years before Wood. The only sentencing standard the jury in petitioner's case was given was in this instruction:

> There is no fixed standard as to the degree of persuasion needed for a particular sentence, as the law leaves that consideration to the jury, but the burden to satisfy the jury that a death sentence is appropriate is on the State.

Sent. Instr. No. 2, St. R. 412. On direct appeal, petitioner's counsel argued that this instruction was inadequate, and that a reasonable doubt standard was required; the Utah Supreme Court rejected that argument. See State v. Andrews, 574 P.2d 709, 710 (Utah 1977). After Wood, the Utah Court reversed itself and held that the exact same sentencing instruction given the jury in petitioner's case "was obviously in error." State v. Norton, 675 P.2d 577, 584 (Utah 1983). However, when petitioner reapplied to the Utah Supreme Court for relief in light of its decision in Wood, that court held that the Wood standard was "nonretroactive" --inapplicable to this case, and this case alone--noting that "Wood ... was grounded in statutory interpretation ...." Andrews

v. Morris, 677 P.2d 81, 91 (Utah 1983).[17] The federal courts below rejected petitioner's arguments against the extraordinary effect of this "nonretroactivity" holding, by emphasizing that "the Wood standard is one of statutory construction of the Utah law and it is in no way a constitutional principle." Andrews v. Shulsen, 600 F.Supp. at 427; see also Andrews v. Shulsen, 802 F.2d at 1270, App. A-15.

We submit this presents a question worthy of this Court's review. As the Utah Court pointed out in Wood, a number of state sentencing statutes follow the reasonable doubt standard as a matter of statutory direction or construction. State v. Wood, supra, 648 P.2d at 84-5. The federal circuits that have considered this issue have rejected such a standard as an Eighth Amendment requirement. See Ford v. Strickland, 696 F.2d 804, 818 (11th Cir. 1983), cert. denied, 464 U.S. 865 (1984); Harris v. Pulley, 692 F.2d 1192, 1195 (9th Cir. 1982). However, this "Court has not addressed the specific issue as to which standard of persuasion the Eighth Amendment through the Due Process Clause of the Fourteenth Amendment, or that clause itself, requires imposing the death penalty," State v. Wood, supra, 648 P.2d at 82, although the issue has drawn the attention of several individual Justices on several occasions in recent years. See, e.g., Teague v. Tennessee, 473 U.S. 911 (1985) (Justices Marshall and Brennan); Pinch v. North Carolina, 459 U.S. 1056 (1982) (Justice Stevens).

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[17] In this opinion the Utah Supreme Court alternatively said that the failure to apply the Wood standard to petitioner's case was harmless error. Andrews v. Morris, supra, 677 P.2d at 95-96. In so doing, it quoted statements from its previous opinions regarding petitioner's co-defendant, Dale Pierre, as if they had applied to petitioner (ibid.), and misstated the facts regarding his absence from the scene at the time of the rape and homicide, which it itself had previously acknowledged, id. at 98. Respondent has never attempted to defend this harmless error analysis, which was obviously based on a serious misreading of the record; and neither of the federal courts below relied on or deferred to it in any way.

The context of this case raises this issue starkly: a single set of defendants, uniquely among the defendants in this state, denied the protection of such a standard, and sentenced under a state law with virtually no other controls on the arbitrary imposition of the death penalty. See Part III, above. If a sentencing standard that removes "substantial doubt" about the appropriateness of a death sentence is ever required, it should have been required in this case.

Because of that--and because the facts of petitioner's case make it one where a different statutory standard may well have made a difference as to the sentence imposed--certiorari should be granted here to resolve this issue, as well.

CONCLUSION

For the foregoing reasons, the writ of certiorari should be granted.

Respectfully submitted,

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COUNSEL FOR PETITIONER

Dated: Seattle, Washington
September 8, 1987

APPENDIX A

Andrews v. Shulsen, 802 F.2d 1256 (10th Cir. 1986),
and Order of June 8, 1987, Denying Rehearing

William ANDREWS,
Petitioner-Appellant
Cross-Appellee,

v.

Kenneth V. SHULSEN, Warden of the Utah State Prison, and David L. Wilkinson, Attorney General of the State of Utah, Respondents-Appellees Cross-Appellants.

Washington Legal Foundation,
Amicus Curiae.

Nos. 84-2781, 85-1024.

United States Court of Appeals,
Tenth Circuit.

Oct. 6, 1986.

Habeas petitioner sought relief following state murder conviction and death sentence. The United States District Court for the District of Utah, David K. Winder, J., 600 F.Supp. 408, denied relief, and petitioner appealed. The Court of Appeals, Seymour, Circuit Judge, held that: (1) Utah's death penalty statute is constitutional; (2) petitioner failed to preserve claim in state court challenging aggravating circumstance of killing for personal gain; (3) sentencing instructions provided sufficient guidance on proper weight to be accorded aggravating and mitigating circumstances; (4) petitioner was not entitled to hearing on claim of racial discrimination in death sentencing; and (5) ... tions did not permit petitioner's conviction for first-degree murder without sufficient finding that he personally intended to kill or intended that life would be taken.

Affirmed.

1. Criminal Law ⇐1208.1(4)

Discretion inherent in capital sentencing decisions must be suitably directed and limited so as to minimize risk of wholly arbitrary and capricious action.

2. Criminal Law ⇐1208.1(2)

Valid capital punishment statute must prescribe aggravating circumstances or their equivalent which genuinely narrow class of persons who are subject to execution.

3. Criminal Law ⇐1208.1(5)

If prosecution establishes that defendant's crime fits at least one legislatively defined category of persons subject to execution, sentencing body may consider relevant nonstatutory aggravating factors and must be allowed to consider any mitigating evidence before deciding on death sentence.

4. Criminal Law ⇐1208.1(6)

Sentencing phase of capital case involves an individualized determination of appropriate penalty based upon relevant characteristics of defendant and circumstances of offense.

5. Criminal Law ⇐1208.1(6)

Jury which imposes death sentence need not make specific written findings of aggravating and mitigating circumstances for purposes of review if sentencing mechanism is otherwise valid.

6. Homicide ⇐351

Utah's statutory death sentencing scheme, which restricts capital homicides to intentional or knowing murders committed under eight aggravating circumstances, all elements of crime of first-degree murder, is constitutional. U.C.A.1953, 76-5-202.

7. Habeas Corpus ⇐45.3(1.50)

Habeas petitioner did not show prejudice so as to excuse procedural default in failing to raise in state court his claim that aggravating circumstance used in imposing death sentence could not withstand scrutiny; even if that circumstance was constitutionally overbroad as claimed, two other statutory grounds for death sentence existed.

8. Criminal Law ⇐1213.8(8)

Eighth Amendment does not require jury to identify aggravating circumstances it has relied upon to convict capital defendant. U.S.C.A. Const.Amend. 8.

9. Criminal Law ⇐1172.9

When one charged aggravating circumstance later proves invalid or unsupported by record, validity of death sentence depends on function of jury's finding of an aggravating circumstance under state's capital sentencing statute, and on reasons that aggravating circumstance at issue in particular case was found to be invalid.

10. Criminal Law ⇐1208.1(6)

When at least one statutory aggravating circumstance has been established, specific standards for balancing aggravating against mitigating circumstances are not constitutionally required, and thus, sentencing authorities may determine defendant's fate without regard for burdens of proof or other measures of certainty.

11. Criminal Law ⇐796

Jury should be instructed that law recognizes circumstances which may be considered as extenuating or otherwise reducing defendant's culpability and hence his punishment.

12. Criminal Law ⇐796

Instructions in capital sentencing phase were not insufficient with regard to proper weight to be accorded aggravating and mitigating circumstances, where trial judge recited statutory mitigating circumstances, did not stress significance of aggravating circumstances but simply listed relevant factors, directed jury to consider any other factor in mitigation or aggravation that would be considered by responsible person, instructed jury to weigh various factors, and required state to bear burden of demonstrating that death was appropriate penalty.

13. Criminal Law ⇐1213.8(8)

Pattern of discriminatory or otherwise arbitrary sentencing decisions in capital cases can violate Eighth Amendment re-

gardless of intent. U.S.C.A. Const.Amend. 8.

14. **Habeas Corpus** ⇐90.2(10)

Habeas petitioner failed to make sufficient showing of discrimination in statutory scheme under which he received death penalty so as to be entitled to evidentiary hearing.

15. **Courts** ⇐100(1)

Constitution neither prohibits nor requires retroactivity of judicial decisions.

16. **Constitutional Law** ⇐253(4)

State in defining limits of adherence to precedent may make choice for itself between principle of forward operation and that of relation backward; either choice affords due process of law. U.S.C.A. Const.Amends. 5, 14.

17. **Constitutional Law** ⇐250.3(1)

State supreme court, in applying retroactively its decision on aggravating and mitigating circumstances to capital cases pending on direct appeal but not cases already filed, did not violate equal protection rights of defendant in latter group; court drew rational distinction in concluding that state's interest in finality of criminal convictions warranted retroactive application only to direct appeals. U.S.C.A. Const. Amends. 5, 14.

18. **Courts** ⇐100(1)

State supreme court, by applying retroactively its decision on aggravating and mitigating circumstances to capital cases pending on direct appeal but not to cases already final, did not violate established principles of retroactivity; court confronted question of first impression in state, exhaustively analyzed relevant federal cases and reached reasonable result.

19. **Criminal Law** ⇐1213.8(8)

Eighth Amendment prohibits imposition of death penalty upon one who does not himself kill, attempt to kill or intend that killing take place or that lethal force will be employed. U.S.C.A. Const.Amend. 8.

20. **Habeas Corpus** ⇐85.1(2)

Death sentence may rest upon guilty verdict which necessitates finding of intent, or upon appropriate factual findings made by state trial judge or appellate court; if so, it is presumed correct in subsequent federal habeas proceedings, and if not, federal court must afford state court opportunity to make requisite finding.

21. **Homicide** ⇐305

Instructions defining party to murder, as prosecution of defendant who was present at but did not actually commit murder in question, did not permit defendant's conviction for first-degree murder without sufficient finding that he personally intended to kill or intended that life would be taken.

Timothy K. Ford, Seattle, Wash., for petitioner-appellant, cross-appellee.

Earl F. Dorius, Asst. Atty. Gen. (David L. Wilkinson, Atty. Gen., and David J. Schwendiman, Asst. Atty. Gen.), State of Utah, Salt Lake City, Utah, for respondents-appellees, cross-appellants.

Daniel J. Popeo and George C. Smith on the brief for Washington Legal Foundation, amicus curiae, Washington, D.C.

Before McKAY, McWILLIAMS, and SEYMOUR, Circuit Judges.

SEYMOUR, Circuit Judge.

William Andrews appeals from an order of the United States District Court for the District of Utah dismissing a habeas corpus petition challenging the constitutionality of his death sentence. *See Andrews v. Shulsen*, 600 F.Supp. 408 (D.Utah 1984) (*Andrews IV*). We affirm.

I.

BACKGROUND

The facts of this case, as reported in opinions of the Utah Supreme Court, are as follows:

"[Dale Pierre,] Andrews, and [Keith] Roberts were airmen stationed at Hill

Air Force Base, Utah. Stanley Walker, Michelle Ansley, Carol Naisbitt, Cortney Naisbitt (son of Carol Naisbitt), and Orren W. Walker, Jr. (father of Stanley Walker) were tied up, made to lie on the floor, and forced to drink liquid Drano on the evening of April 22, 1974, in the basement of the Hi-Fi Shop in Ogden, Utah, by [Pierre] in company with Andrews, who aided [Pierre] by pouring the caustic substance into a plastic cup for accomplishment of these violent acts. [Pierre] and Andrews both had hand guns and [Pierre] finally shot all of the victims in the head with either a .25 caliber or .38 caliber handgun, which caused the deaths, within a brief period of time during that April evening, of Stanley Walker, Michelle Ansley (who had also been raped by [Pierre] just before he shot her) and Carol Naisbitt.

. . . .

"[A]fter shooting [Orren Walker, Pierre] vehemently kicked a ball point pen into one of his ears and attempted to strangle him with a cord."

State v. Pierre, 572 P.2d 1338, 1343–44 (Utah 1977) (footnote omitted), *cert. denied*, 439 U.S. 882, 99 S.Ct. 219, 58 L.Ed.2d 194 (1978).

"Evidence by witness Orren W. Walker, Jr. at the guilt phase revealed that [Andrews] asked Pierre in the basement of the Hi-Fi Shop, after Pierre had discharged his hand gun (not at that time shooting anyone), 'What did you do that for, man'; that [Andrews] was nervous and upset; that when Walker made no movement after being told by Pierre to administer the Drano to Michelle Ansley, Stanley Walker, and Cortney Naisbitt, [Andrews] said to Walker, 'Man, there is a gun at your head'; that either before or after the administration of the Drano to the victims [Andrews] said: 'I can't do it, I'm scared', though Walker stated he did not know to what this remark of [Andrews'] referred; and that Andrews, who left and returned to the basement on more than one occasion during the evening of April 22nd, was not observed firing any gun nor was he present when Michelle was raped and all the victims were shot."

State v. Andrews, 574 P.2d 709, 709–10 (Utah 1977) (*Andrews I*), *cert. denied*, 439 U.S. 882, 99 S.Ct. 219, 58 L.Ed.2d 194 (1978).

"Evidence further established that Orren and Stanley Walker were robbed in an aggravated manner of personal property in their possession (equipment from the Hi-Fi Shop being taken from Stanley and a watch and wallet being taken from Orren) . . . by [Pierre], Andrews, and Roberts. [Pierre] and Andrews were identified inside of said shop during the robbery and Roberts was identified walking in front of it."

Pierre, 572 P.2d at 1343.

The three men were apprehended and tried together before a jury. Andrews and Pierre were found guilty on three counts of first degree murder and two counts of aggravated robbery. Roberts was convicted of aggravated robbery, but the jury was unable to reach a verdict on the murder charges. After a separate sentencing hearing, the same jury voted unanimously to impose the death penalty on Andrews and Pierre for each of the murder convictions. On November 27, 1974, the trial judge sentenced them to death before a firing squad. During the next six years, Andrews unsuccessfully challenged his conviction and sentence on direct appeal, *see Andrews I*, 574 P.2d 709, and in collateral state proceedings, *see Andrews v. Morris*, 607 P.2d 816 (Utah) (*Andrews II*), *cert. denied*, 449 U.S. 891, 101 S.Ct. 254, 66 L.Ed.2d 120 (1980).

In November 1980, Andrews filed this action for federal habeas corpus relief. The State responded by moving to dismiss his petition on the merits and on the basis of alleged procedural defaults in the state courts. While the federal proceedings were pending, the Utah Supreme Court decided *State v. Wood*, 648 P.2d 71 (Utah 1981) (per curiam), *cert. denied*, 459 U.S. 988, 103 S.Ct. 341, 74 L.Ed.2d 383 (1982), which raised the burden of persuasion in the sentencing phase of Utah capital cases.

The federal district court stayed further proceedings while Andrews again sought collateral state relief. The Utah Supreme Court declined to apply *Wood* retroactively and denied Andrews' petition for relief. *See Andrews v. Morris*, 677 P.2d 81 (Utah 1983) (*Andrews III*).

The district court then ordered the parties to address all outstanding issues. In his second amended petition, Andrews claimed that: (1) Utah had denied him a fair and impartial jury trial; (2) the Utah capital punishment statute was unconstitutional; (3) the statute resulted in the arbitrary and capricious imposition of the death penalty; (4) the Utah Supreme Court unconstitutionally failed to apply the *Wood* decision retroactively; (5) his death sentence is improper under *Enmund v. Florida*, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982), because there was no finding that he intended to kill; (6) Utah's provision for execution before a firing squad violates the Establishment Clause; and (7) this method of execution constitutes cruel and unusual punishment.

The district court concluded that no evidentiary hearing was required to reach a decision, *see Andrews IV*, 600 F.Supp. at 415–16, declined to resolve the issue of procedural default, *see id.* n. 4, and ruled against Andrews on the merits of his claims, *see id.* at 415–32. Accordingly, the court denied Andrews' petition for a writ of habeas corpus and dismissed the action. *See id.* at 432. This appeal followed. With the State's consent, *see* Transcript of Oral Argument at 31–33, we withheld our resolution of the case pending the Supreme Court's decision in *Cabana v. Bullock*, — U.S. —, 106 S.Ct. 689, 88 L.Ed.2d 704 (1986).

II.

FAIRNESS OF ANDREWS' TRIAL

Andrews asserts that adverse publicity and hostile community sentiment undermined his right to a fair trial, and that he is entitled to a federal evidentiary hearing on this claim. Having reviewed the briefs and the appellate record, we conclude that no hearing is required under the principles of *Townsend v. Sain*, 372 U.S. 293, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963), and that the constitutional standard for a fair trial has been met. We agree with the district court's treatment of these two issues. Accordingly, we adopt the relevant portion of that court's opinion as our own. *See Andrews IV*, 600 F.Supp. at 415–20.

III.

CONSTITUTIONALITY OF UTAH DEATH PENALTY STATUTE

[1] We next address Andrews' claim that the Utah death penalty statute is unconstitutional. The Supreme Court has mandated that the discretion inherent in capital sentencing decisions "must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." *Gregg v. Georgia*, 428 U.S. 153, 189, 96 S.Ct. 2909, 2932, 49 L.Ed.2d 859 (1976) (opinion of Stewart, Powell and Stevens, JJ.); *accord Zant v. Stephens*, 462 U.S. 862, 874, 103 S.Ct. 2733, 2741, 77 L.Ed.2d 235 (1983). Although the constitutionality of capital punishment laws ultimately turns on an examination of each distinct system, *e.g.*, *Pulley v. Harris*, 465 U.S. 37, 45, 104 S.Ct. 871, 876, 79 L.Ed.2d 29 (1984); *Zant*, 462 U.S. at 874–75, 103 S.Ct. at 2741, the Supreme Court has emphasized several points which guide our consideration of this case.

[2–4] A valid capital punishment statute must prescribe aggravating circumstances or their equivalent which genuinely narrow the class of persons who are subject to execution. *Zant*, 462 U.S. at 876–78, 103 S.Ct. at 2742–43; *Godfrey v. Georgia*, 446 U.S. 420, 423–29, 100 S.Ct. 1759, 1764–65, 64 L.Ed.2d 398 (1980) (plurality opinion); *accord Pulley*, 465 U.S. at 53, 104 S.Ct. at 881; *Jurek v. Texas*, 428 U.S. 262, 270–71, 96 S.Ct. 2950, 2955–56, 49 L.Ed.2d 929 (1976) (opinion of Stewart, Powell, and Stevens, JJ.); *Proffitt v. Florida*, 428 U.S. 242, 250 & n. 8, 256 n. 14, 96 S.Ct. 2960, 2965 & n. 8, 2968 n. 14, 49 L.Ed.2d 913

(1976) (opinion of Stewart, Powell, and Stevens, JJ.). If the prosecution establishes that a defendant's crime fits at least one of these legislatively defined categories, the sentencing body may consider relevant nonstatutory aggravating factors, *see California v. Ramos*, 463 U.S. 992, 1008, 103 S.Ct. 3446, 3457, 77 L.Ed.2d 1171 (1983); *Zant*, 462 U.S. at 878, 103 S.Ct. at 2743, and must be allowed to consider any mitigating evidence before deciding on a death sentence, *see Lockett v. Ohio*, 438 U.S. 586, 604, 98 S.Ct. 2954, 2964, 57 L.Ed.2d 973 (1978); *accord Eddings v. Oklahoma*, 455 U.S. 104, 110–12, 102 S.Ct. 869, 874–75, 71 L.Ed.2d 1 (1982). The sentencing phase of a capital case thus involves an individualized determination of the appropriate penalty based upon relevant characteristics of the defendant and the circumstances of his offense. *Ramos*, 463 U.S. at 1006, 103 S.Ct. at 3456; *Zant*, 462 U.S. at 879, 103 S.Ct. at 2743. Notwithstanding the wide range of information the jury may consider, its ultimate exercise of discretion is invariably focused through instruction on the various factors. *See, e.g., Pulley*, 465 U.S. at 53, 104 S.Ct. at 881; *Proffitt*, 428 U.S. at 258, 96 S.Ct. at 2969; *Gregg*, 428 U.S. at 197–98, 96 S.Ct. at 2936.

[5] The Court has upheld only sentencing schemes that provide for some form of meaningful appellate review. *See Pulley*, 465 U.S. at 54–59, 104 S.Ct. at 881–884 (Stevens, J., concurring in part and in the judgment) (reviewing cases). A jury need not make specific written findings of aggravating and mitigating circumstances for purposes of review if the sentencing mechanism is otherwise valid. *See Jurek*, 428 U.S. 262, 96 S.Ct. at 2952 (juries required only to answer three general questions in order to impose death penalty).

A. The Utah Statute

[6] We hold that Utah's statutory sentencing scheme is constitutional. The State has restricted capital homicides to intentional or knowing murders committed under eight aggravating circumstances.[1] *See* Utah Code Ann. § 76–5–202 (1973) (current version at § 76–5–202 (1986 Supp.)). These circumstances are elements of the crime of first degree murder. One or more must therefore be proved beyond a reasonable doubt in the guilt phase of a capital case.

First degree murder is punishable by death or life imprisonment, *see id.* § 76–3–206 (1973), and a separate hearing takes place upon conviction to determine a defendant's sentence, *see id.* § 76–3–207(1) (1973) (current version at § 76–3–207 (1986 Supp.)). The parties may present evidence on any matter the court deems relevant to sentencing, "including but not limited to the nature and circumstances of the crime, the defendant's character, background, history, mental and physical condition, and any other facts in aggravation or mitigation of the penalty." *Id.* § 76–3–207(1) (1973). Aggravating circumstances include, but are not limited to, those listed as

1. The enumerated aggravating circumstances are:

"(a) The homicide was committed by a convict under sentence of imprisonment.

(b) At the time the homicide was committed the actor also committed another homicide.

(c) The actor knowingly created a great risk of death to a person other than the victim and the actor.

(d) The homicide was committed while the actor was engaged in the commission of, or an attempt to commit, or flight after committing or attempting to commit, robbery, rape, forcible sodomy, or aggravated sexual assault or arson, burglary or kidnapping.

(e) The homicide was committed for the purpose of avoiding or preventing an arrest by a peace officer acting under color of legal authority or for the purpose of effecting an escape from lawful custody.

(f) The homicide was committed for pecuniary or other personal gain.

(g) After having previously been convicted of first or second degree murder.

(h) The homicide was committed upon a child under the age of twelve years as the result of physical abuse or neglect."

Utah Code Ann. § 76–5–202(1) (1973). The current statute lists seventeen aggravating circumstances. *See id.* § 76–5–202(1) (1986 Supp.). We express no opinion on its constitutionality but confine our attention to the 1973 statutes under which Andrews was sentenced.

elements of first degree murder. *See id.* Section 76–3–207(1) specifies six mitigating circumstances and authorizes the consideration of any other mitigating factors.[2] *See id.* Although the statute mandates no particular burden of proof, the Utah Supreme Court held in connection with this case that the totality of evidence of aggravating circumstances must outweigh the totality of mitigating circumstances by a preponderance of the evidence in order to impose the death penalty.[3] *See Pierre*, 572 P.2d at 1347–48. The court or jury which convicts a capital defendant determines his sentence, although the defendant may waive the jury at the penalty phase and be sentenced by the court. Utah Code Ann. § 76–3–207(1) (1973). A jury verdict imposing the death penalty must be unanimous. *Id.* § 76–3–207(2) (1973).

A capital defendant who has been sentenced to death may appeal to the Utah Supreme Court. *Pierre*, 572 P.2d at 1345; *see also* Utah Code Ann. § 76–3–207(3) (1973) (current version at § 76–3–207(4) (1986 Supp.)). That court conducts "a comprehensive review of the entire case, including a review of a sentence of death to determine if that sentence resulted from prejudice or arbitrary action or was disproportionate to the [crime]." *Pierre*, 572 P.2d at 1345. Furthermore, the court considers prejudicial errors which are neither assigned nor argued. *See id.* n. 9 (citing *State v. Stenback*, 78 Utah 350, 2 P.2d 1050 (1931)); *State v. St. Clair*, 3 Utah 2d 230, 282 P.2d 323, 327 (1955).

Utah has limited the class of defendants subject to execution by requiring that a jury find at least one statutory aggravating circumstance beyond a reasonable doubt in the guilt phase of a first degree murder trial. *See Pierre*, 572 P.2d at 1348. A prescribed list of relevant factors guides the jury's ultimate sentencing decision, and the requirement that aggravating outweigh mitigating circumstances directs the jury to focus upon factors favoring leniency versus death. The jury's discretion is "suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." *Gregg*, 428 U.S. at 189, 96 S.Ct. at 2932 (opinion of Stewart, Powell, and Stevens, JJ.). Appellate review of the entire case ensures that discretion has not been exercised arbitrarily. This form of capital punishment law is constitutionally permissible under prevailing Supreme Court decisions. *See, e.g., Pulley*, 465 U.S. at 53, 104 S.Ct. at 881; *Jurek*, 428 U.S. at 276, 96 S.Ct. at 2958.

B. Additional Issues

Andrews raises numerous objections to the Utah statutory scheme, most of which we have considered and implicitly rejected in discussing the statute as a whole. Two remaining issues warrant further discussion. Andrews argues that the jury may have convicted him on the basis of an invalid statutory aggravating circumstance, and that the instructions given in the sentenc-

2. The enumerated mitigating circumstances are:
"(a) The defendant has no significant history of prior criminal activity;
"(b) The murder was committed while the defendant was under the influence of extreme mental or emotional disturbance;
"(c) The defendant acted under extreme duress or under the substantial domination of another person;
"(d) At the time of the murder, the capacity of the defendant to appreciate the criminality (wrongfulness) of his conduct or to conform his conduct to the requirement of law was substantially impaired as a result of mental disease, intoxication, or influence of drugs;
"(e) The youth of the defendant at the time of the crime;
"(f) The defendant was an accomplice in the murder committed by another person and his participation was relatively minor;
"(g) And any other fact in mitigation of the penalty."
Utah Code Ann. § 76–3–207(1) (1973).

3. Andrews and Pierre were sentenced according to jury instructions embodying this standard. *See Pierre*, 572 P.2d 1338. The Utah court has since decided that the sentencer must find beyond a reasonable doubt both that the aggravating circumstances outweigh those in mitigation, and that the death penalty is appropriate. *See Wood*, 648 P.2d 71.

ing phase did not provide the jury with adequate guidance.[4]

1. Killing for Personal Gain

Andrews argues that one of the aggravating circumstances submitted to the jury in this case, killing for personal gain, cannot withstand scrutiny.[5] He contends that this aggravating circumstance is constitutionally overbroad because practically every deliberate homicide could be viewed as committed for the benefit of the perpetrator. The State responds that even if "killing for personal gain" is overbroad, the trial judge cured the problem by narrowly defining the term when he instructed the jury. His instruction stated:

> "A killing for personal gain is defined in law as a killing so as to gain a substantial advantage or to rid oneself of substantial difficulty. It would be killing for personal gain if the motive for the killing was to silence a witness, prevent the discovery and prosecution of a crime, or to hide the identity of a perpetrator of crime because the escaping of such prosecution would be considered in law as personal gain."

Rec., vol. XVI, state trial rec., vol. R-3, at 352. The district court held that this instruction satisfied constitutional concerns. *See Andrews IV*, 600 F.Supp. at 424.

[7] We do not reach the merits of this contention because Andrews failed to preserve this claim in state court. When "a defendant has failed to abide by a State's procedural rule requiring the exercise of legal expertise and judgment, ... [he] may not obtain federal habeas corpus relief absent a showing of 'cause and actual prejudice.'" *Reed v. Ross*, 468 U.S. 1, 11, 104 S.Ct. 2901, 2908, 82 L.Ed.2d 1 (1984) (quoting *Engle v. Isaac*, 456 U.S. 107, 129, 102 S.Ct. 1558, 1572, 71 L.Ed.2d 783 (1982)). Andrews argues that he is entitled to an evidentiary hearing on the question of cause. However, we need not decide whether Andrews could satisfy the cause requirement because we conclude for the following reasons that he was not prejudiced.

[8] Even if the "personal gain" aggravating circumstance is constitutionally overbroad, we are required to sustain Andrews' death sentences because of the unimpeachable presence of two other statutory grounds. The case was submitted to the jury on six theories of aggravation. *See supra* note 5. Although the jury did not specify which of these aggravating circumstances it had found, the Eighth Amendment does not require a jury to identify the aggravating circumstances it has relied upon to convict a capital defendant under a statute such as Utah's. *See Jurek*, 428 U.S. at 265 n. 1, 267-68, 96 S.Ct. at 2953 n. 1, 2954.

[9] When one of the charged circumstances later proves invalid or unsupported by the record, however, the validity of the death sentence "depends on the function of the jury's finding of an aggravating circumstance under [the State's] capital sentencing statute, and on the reasons that the aggravating circumstance at issue in [the] particular case was found to be invalid." *Zant*, 462 U.S. at 864, 103 S.Ct. at 2736. Here, like the Georgia statute in *Zant*, aggravating circumstances function in the guilt phase to narrow the class of persons who may be sentenced to death. *See id.* at 874, 879, 103 S.Ct. at 2741, 2743.

In *Zant*, the Court was clearly concerned with the reliability of the jury's determination that the death penalty was appropri-

4. Andrews also claims that specific aggravating circumstances should have been alleged in the state's charging documents. We disagree. Andrews could have requested a bill of particulars but failed to do so. In any event, statutory notice of aggravating circumstances satisfies constitutional requirements under the Due Process Clause. *See Spinkellink v. Wainwright*, 578 F.2d 582, 609-10 (5th Cir.1978), *cert. denied*, 440 U.S. 976, 99 S.Ct. 1548, 59 L.Ed.2d 796 (1979).

5. The case was submitted under a total of six theories of aggravation: (1) multiple killings, (2) creating a great risk of death to persons other than the victim and defendant, (3) killing in perpetration of robbery, (4) killing in perpetration of rape, (5) killing for pecuniary gain, and (6) killing for personal gain. *See* rec., vol. XVI, state trial rec., vol. R-3, at 351-52.

ate. "[B]ecause there is a qualitative difference between death and any other permissible form of punishment, 'there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.'" *Id.* at 884–85, 103 S.Ct. at 2746–47 (quoting *Woodson v. North Carolina*, 428 U.S. 280, 305, 96 S.Ct. 2978, 2991, 49 L.Ed.2d 944 (1976) (opinion of Stewart, Powell, and Stevens, JJ.)). The Georgia statute at issue in *Zant* required juries to specify in writing the statutory aggravating circumstances upon which they had relied. The Court could thus be certain that the challenged death sentence rested upon valid circumstances which had been found by the jury in addition to the one later held invalid.

The jury's determination in this case is reliable notwithstanding the general verdict of guilt. Because Andrews and Pierre were each convicted of three murders, the jury could not have failed to find the aggravating circumstance of multiple killings. *See supra* note 5. Similarly, because they were convicted of aggravated robbery, the jury was compelled to find the circumstance of killing in perpetration of robbery. *See id.* Andrews' convictions therefore rest upon at least two well-founded statutory aggravating circumstances which, under the Utah statute, place him in the restricted class of defendants who may be sentenced to death.

The Court in *Zant* also satisfied itself that all evidence relating to the invalid circumstance was otherwise fully admissible at the sentencing phase. *See Zant*, 462 U.S. at 886–87, 890, 103 S.Ct. at 2747–48, 2749. Similarly, the instant case is not one where inadmissible or prejudicial evidence was improperly admitted in connection with the statutory aggravating circumstance of killing for personal gain. Any evidence of killing for personal gain was admissible as evidence of the crime and also admissible as evidence of non-statutory aggravating circumstances under Utah Stat. Ann. § 76-3-207(1) (1973). *See Zant*, 462 U.S. at 885–91, 103 S.Ct. at 2747–50; *cf. Smith v. Murray*, — U.S. —, 106 S.Ct. 2661, 2676–77 & n. 24, 91 L.Ed.2d 434 (1986) (Stevens, J., dissenting) (introduction of highly prejudicial, inadmissible evidence represents independent constitutional violation); *Barclay v. Florida*, 463 U.S. 3418, 103 S.Ct. 3418, 77 L.Ed.2d 1134 (1983).

In sum, Andrews can not establish the prejudice necessary to overcome his procedural default.

2. Sufficiency of sentencing instructions

[10] Andrews also argues that the instructions in the sentencing phase were insufficient with regard to the proper weight to be accorded aggravating and mitigating circumstances. Appropriate sentencing instructions in a capital case guide the jury in its deliberations and focus attention upon the relevant factors to be considered. When at least one statutory aggravating circumstance has been established, "*specific standards* for balancing aggravating against mitigating circumstances are not constitutionally required." *Zant*, 462 U.S. at 876 n. 13, 103 S.Ct. at 2742 n. 13 (emphasis added); *see also Ford v. Strickland*, 696 F.2d 804, 817–19 (11th Cir.) (en banc), *cert. denied*, 464 U.S. 865, 104 S.Ct. 201, 78 L.Ed.2d 176 (1983). Thus, sentencing authorities may determine a defendant's fate without regard for burdens of proof or other measures of certainty.

[11] At the same time, a jury should be instructed that the law recognizes circumstances which may be considered as extenuating or otherwise reducing a defendant's culpability and hence his punishment. *See Spivey v. Zant*, 661 F.2d 464, 471 & n. 8 (5th Cir.1981), *cert. denied*, 458 U.S. 1111, 102 S.Ct. 3495, 73 L.Ed.2d 1374 (1982); *accord Goodwin v. Balkcom*, 684 F.2d 794, 800–03 (11th Cir.1982), *cert. denied*, 460 U.S. 1098, 103 S.Ct. 1798, 76 L.Ed.2d 364 (1983). In *Spivey*, the court overturned a death sentence where the state trial judge had instructed on the existence of aggravating circumstances while failing to mention that countervailing considerations might counsel in favor of leniency. *See Spivey*, 661 F.2d at 472. The Eleventh

Circuit recently reaffirmed its holding in *Spivey* and further held:

> "[T]he Constitution requires that there be no reasonable possibility that a juror will misunderstand the meaning and function of mitigating circumstances, *i.e.*, that the law recognizes the existence of circumstances which in fairness or mercy may be considered as extenuating or reducing the punishment."

Peek v. Kemp, 784 F.2d 1479, 1494 (11th Cir.1986) (en banc); *see also id.* n. 16; *People v. Brown*, 40 Cal.3d 512, 220 Cal.Rptr. 637, 709 P.2d 440, 452–53 (1985) (en banc) (jury instructed not to consider sympathy for defendant), *cert. granted sub nom. California v. Brown*, — U.S. —, 106 S.Ct. 2274, 90 L.Ed.2d 717 (1986).

[12] The sentencing instructions in this case provided sufficient guidance. The Utah statute identifies and lists both aggravating and mitigating circumstances. *See supra* pp. 1261–62 & notes 2, 3. The trial judge recited the statutory mitigating circumstances, although he did not label them as such or explain their meaning and function.[6] Three aspects of his charge distinguish this case from *Spivey*. First, the judge did not stress the significance of aggravating circumstances but simply listed the relevant factors. Second, at the close of this list, he directed the jury to consider "[a]ny other factor in mitigation or aggravation that would be considered by a responsible person...." *See supra* note 6. Finally, and most importantly, he instructed the jury to weigh these various factors and required the State to bear the burden of demonstrating that death was the appropriate penalty.[7] These instructions emphasized that mitigating factors should be considered and that they could prove decisive in the balancing process. The jury was thus informed of its duty to decide between leniency and death on the basis of mitigating as well as aggravating evidence. Accordingly, we reject Andrews' challenge to the sentencing instructions.

IV.

ALLEGED RACIAL DISCRIMINATION

Andrews contends that the Utah death penalty statute has failed in practice to alleviate the arbitrariness that marked the administration of capital punishment prior

6. Instruction No. 4 reads in pertinent part as follows:

> "You may consider the nature and circumstances of the crime, the character of the defendant, his background, his general personal history, his mental and physical condition, and other factors.
>
> "You may consider
>
> (a) Whether or not the defendant has any significant history of prior criminal activity;
>
> (b) Whether or not murder was committed while the defendant was under the influence of any mental or emotional disturbance or duress;
>
> (c) Whether or not the defendant acted under duress or substantial domination of another person;
>
> (d) The general capacity of the defendant to appreciate the wrongfulness of his conduct, or the ability to conform his conduct to the standards required by law and whether or not such capacity was substantially impaired as a result of any mental disease, or intoxication;
>
> (e) The youth of the defendant at the time of the crime;
>
> (f) Whether or not the defendant was a party to the murder committed by another person and whether his participation was relatively minor or major;
>
> (g) Any other factor in mitigation or aggravation that would be considered by a responsible person making such a decision in an appropriate manner.

Rec., vol. XVI, state trial rec., vol. R-3, at 414–15.

7. Instructions No. 1 and No. 2 read in pertinent part:

> "It is the duty of the court to instruct you in the law that applies to the sentence procedure.... On the other hand, *it is your exclusive province to determine the sentence in this case, and you should consider and weigh the factors mentioned in this instruction for that purpose.* You may use the instructions given you in the case as they apply.
>
> "You are instructed that it would be improper for you to again debate the question of guilt or innocence of any defendant already found guilty. There is no fixed standard as to the degree of persuasion needed for a particular sentence, as the law leaves that consideration to the jury but *the burden of proof to satisfy the jury that a death sentence is appropriate is on the State.*"

Rec., vol. XVI, state trial rec., vol. R-3, at 412 (emphasis added).

to *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346.[8] In this context, arbitrariness can mean either purely random application of the death penalty, or its imposition on the basis of a legally irrelevant factor such as race. *Compare id.* at 309–10, 92 S.Ct. at 2762 (Stewart, J., concurring), *and id.* at 312–13, 92 S.Ct. at 2763–64 (White, J., concurring), *with id.* at 249–57, 92 S.Ct. at 2731–35 (Douglas, J., concurring), and *id.* at 364–66, 92 S.Ct. at 2790–91 (Marshall, J., concurring). Andrews, a black, claims that racial discrimination impermissibly taints capital punishment in Utah. On appeal, he argues that the district court erred in denying him an evidentiary hearing on this issue.

A hearing would be necessary to receive "any evidence that a *particular* defendant was discriminated against because of his race." *McCleskey v. Kemp*, 753 F.2d 877, 894 (11th Cir.1985) (en banc) (emphasis added), *cert. granted*, — U.S. —, 106 S.Ct. 3331, 92 L.Ed.2d 737 (1986). Conclusory allegations will not suffice to warrant a hearing. *See, e.g., Bashor v. Risley*, 730 F.2d 1228, 1233–34 (9th Cir.), *cert. denied*, 469 U.S. 838, 105 S.Ct. 137, 83 L.Ed.2d 77 (1984). A habeas petitioner must provide supporting factual allegations. *See Townsend v. Sain*, 372 U.S. at 312, 83 S.Ct. at 756.

Andrews' submissions are inadequate to indicate that evidence of discrimination at his trial would be forthcoming if a hearing were held. He alleges adverse treatment by the prosecution, a racially hostile atmosphere at trial, and bias stemming from improper contact with the jury. We have considered and rejected several of Andrews' claims in deciding that he received a fair an ' impartial jury trial.[9] We add only that the prosecution and defense received ample opportunity to question prospective jurors about racial prejudice, *see Turner v. Murray*, — U.S. —, 106 S.Ct. 1683, 90 L.Ed.2d 27 (1986), and that the jury did not convict Keith Roberts of murder even though he too is black and participated in the robbery which culminated in the murders. To the extent that Andrews presents other issues, his allegations are conclusory and therefore insufficient to warrant a hearing.

Andrews seeks to bolster his position by alleging that Utah's sentencing scheme as a whole imposes the death penalty disproportionately on blacks. In *McCleskey*, the Eleventh Circuit sitting en banc considered the doctrinal basis of race discrimination claims in capital cases, the utility of statistical evidence in evaluating such claims, and the circumstances under which an evidentiary hearing must be granted. The majority observed that a claim of discriminatory sentencing could be framed alternatively as cruel and unusual punishment, as a denial of equal protection, and as a violation of due process. *See* 753 F.2d at 890-92. Whichever was chosen, the majority held that:

> "proof of a disparate impact alone is insufficient to invalidate a capital sentencing system, unless that disparate impact is so great that it compels a conclusion that the system is unprincipled, irrational, arbitrary and capricious such that purposeful discrimination—*i.e.*, race is intentionally being used as a factor in sentencing—can be presumed to permeate the system."

8. The State contends that Andrews defaulted on this claim. However, the Utah Supreme Court considered the merits of the argument in the first state habeas case, notwithstanding the prior procedural default. *See Andrews II*, 607 P.2d at 822, 825. If a state court has reached the merits of a claim, a federal habeas court may do the same despite the existence of a state procedural bar. *See, e.g., Morishita v. Morris*, 702 F.2d 207, 209 (10th Cir.1983); *see also County Court of Ulster County v. Allen*, 442 U.S. 140, 147–54, 99 S.Ct. 2213, 2219–23, 60 L.Ed.2d 777 (1979).

9. One incident involved a stick figure at the gallows that was labeled "Hang the Niggers." Sketched on a napkin, this message was discovered by one or more jurors while on their lunch break at a local restaurant. The district court addressed the legal implications of this incident, *see Andrews IV*, 600 F.Supp. at 419–20, and we have adopted that court's *vie ws* in Part II of this opinion.

Id. at 892. The majority reasoned that because *Furman* invalidated only those capital sentencing schemes that operate in an arbitrary fashion, appropriate procedural safeguards will prevent such a result and allow only the possibility of intentional discrimination. *See id.* at 890–92. An evidentiary hearing need not be granted, the majority added, unless a valid statistical study purports to demonstrate a great enough disparity to indicate intentional discrimination. *See id.* at 892–93; *accord Ross v. Kemp*, 756 F.2d 1483, 1491 (11th Cir.1985) (en banc).

The principal dissenting opinion took a different approach. The dissent interpreted the Supreme Court's death penalty decisions as establishing that a statewide pattern of arbitrary sentencing, particularly one skewed on the basis of irrelevant factors such as race, would violate the Eighth Amendment. *See McCleskey*, 753 F.2d at 910 (Johnson, J., dissenting in part and concurring in part). The dissent further emphasized the importance of ensuring fairness when a defendant's life is at stake. Discretionary sentencing, even under a system with procedural safeguards, permits arbitrariness to play a role yet makes it exceedingly difficult to detect. Statistically significant evidence of disparate impact must therefore be relied upon. Focusing upon intent and setting a correspondingly high standard of proof, the dissent implied, condones potentially serious unfairness.

[13] In our view, a pattern of discriminatory or otherwise arbitrary sentencing decisions in capital cases can violate the Constitution regardless of intent.[10] Unlike the Fourteenth Amendment's guarantee of "equal laws, not equal results," *Personnel Administrator v. Feeney*, 442 U.S. 256, 273, 99 S.Ct. 2282, 2293, 60 L.Ed.2d 870 (1979) (sex discrimination), the Eighth Amendment protects against unacceptably inconsistent outcomes. The *Furman* Court invalidated existing death penalty laws not because of the mental state of government officials or jurors but because, as the laws were structured and administered at the time, they failed in practice to distinguish fairly between those who received death sentences and those who did not. *See Gregg*, 428 U.S. at 222–23, 96 S.Ct. at 2947–48 (White, J., concurring in judgment). Each of the concurring opinions in *Furman* relied upon various forms of statistical evidence that purported to demonstrate patterns of random or discriminatory sentencing without regard for an actor's purpose or motive. *See Furman*, 408 U.S. at 249–52, 92 S.Ct. at 2731–33 (Douglas, J., concurring); *id.* at 291–95, 92 S.Ct. at 2753–55 (Brennan, J., concurring); *id.* at 309–10, 92 S.Ct. at 2762 (Stewart, J., concurring); *id.* at 313, 92 S.Ct. at 2764 (White, J., concurring); *id.* at 364–66, 92 S.Ct. at 2790–91 (Marshall, J., concurring).

These invalidated statutes contained none of the procedural safeguards which have since been adopted. The decisive question, however, is not whether constitutionally mandated safeguards exist, but whether they work. We do not believe that *Furman* would have been decided differently had the challenged statutes embodied substantial safeguards but yielded no less random or discriminatory results.

10. Even if intent must be proved, we believe that the standard adopted by the majority in *McCleskey* is too stringent. While intent is difficult enough to prove, intent that permeates an entire sentencing system is practically beyond proof. *Cf. Batson v. Kentucky*, — U.S. —, 106 S.Ct. 1712, 1720–21 & n. 17, 90 L.Ed.2d 69 (1986) (overruling *Swain v. Alabama*, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965), to extent it imposed "crippling burden of proof" on defendants challenging discriminatory exercise of peremptory challenges). Capital defendants are often prepared to demonstrate not only that a disproportionate number of those sentenced to die are black themselves or are the killers of white victims but also that the disparity is statistically significant after accounting for the effect of other explanatory variables. A proffer of this kind meets or exceeds the threshold burden of proof in other contexts where intent must be proved. *See, e.g., Castaneda v. Partida*, 430 U.S. 482, 97 S.Ct. 1272, 51 L.Ed.2d 498 (1977) (selection of grand jury venires); *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 98 S.Ct. 2943, 57 L.Ed.2d 957 (1978) (employment discrimination). To impose a higher burden, as *McCleskey* does, is anomalous even without invoking the need for added fairness in capital cases.

Pre-*Furman* statutes 'were struck down because they failed to generate acceptably consistent outcomes. The intent of actors within the system is not necessarily relevant to the fulfillment of this paramount objective.

The Court has expressly affirmed this conception of the Eighth Amendment in its decisions following *Furman*. Thus "if a State wishes to authorize capital punishment it has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty." *Godfrey*, 446 U.S. at 428, 100 S.Ct. at 1764; *see also Gregg*, 428 U.S. at 195 n. 46, 96 S.Ct. at 2935 (opinion of Stewart, Powell, and Stevens, JJ.). Statutory sentencing schemes that provide for appropriate procedural safeguards have been upheld because they "promised to alleviate" arbitrariness. *See Zant v. Stephens*, 456 U.S. 410, 415, 102 S.Ct. 1856, 1857, 72 L.Ed.2d 222 (1982) (per curiam); *see also Barclay v. Florida*, 463 U.S. 939, 960, 103 S.Ct. 3418, 3430, 77 L.Ed.2d 1134 (1983) (Stevens, J., concurring in the judgment). The constitutionality of such laws therefore depends upon their success in fulfilling this promise. The Court's decisions mandate that "capital punishment be imposed fairly, and with reasonable consistency, or not at all." *Eddings*, 455 U.S. at 112, 102 S.Ct. at 875. Moreover, "[i]t is of vital importance ... that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." *Gardner v. Florida*, 430 U.S. 349, 358, 97 S.Ct. 1197, 1204, 51 L.Ed.2d 393 (1977) (opinion of Stevens, J.). Death is unique among criminal sanctions, and we therefore insist upon a correspondingly higher degree of reliability, consistency, and fairness in capital sentencing decisions. *See, e.g., Zant*, 462 U.S. at 884–85, 103 S.Ct. at 2746–47.

This objective is best accomplished by holding that a pattern of inconsistent sentencing decisions can violate the Eighth Amendment. Juries retain considerable discretion in capital cases. Although the narrowing function served by statutory aggravating circumstances and the availability of appellate review help to ensure that the death penalty will be warranted whenever it is imposed, the additional risk remains that juries will sentence some defendants to death while sparing others who are no less culpable. The pivotal opinions in *Furman* rested upon a perception of just such systemic unfairness, *see Furman*, 408 U.S. at 309–10, 92 S.Ct. at 2762 (Stewart, J., concurring); *id.* at 313, 92 S.Ct. at 2764 (White, J., concurring), and it is exceedingly difficult to assess whether this risk has been adequately guarded against. An inquiry into the intent of juries appears all but impossible. On the other hand, properly designed statistical analyses would facilitate such assessments by accounting for all capital cases and determining to what extent the death penalty is imposed, or not imposed, on the basis of relevant characteristics of the defendant and the circumstances of his offense. Evidence of inconsistent results, of sentencing decisions that cannot be explained on the basis of individual culpability, would indicate that the system is not operating fairly and therefore may violate the Eighth Amendment.

Reading *Furman* narrowly, the *McCleskey* majority insists that only an extreme fact pattern like that presented in *Furman* can violate the Eighth Amendment. Reading *Furman* broadly, the dissent would arguably prohibit any statistically significant pattern of random or discriminatory sentencing decisions. *See McCleskey*, 753 F.2d at 911 & n. 8 (opinion of Johnson, J.). We believe there is an appropriate middle ground. Determining the degree of racially disparate impact that violates the Constitution calls for a court's judgment as well as a statistician's findings. Statistically significant results may not always compel the legal conclusion that a statutory sentencing scheme is unconstitutional. In our view, however, statistical findings of the kind proffered in *McCleskey* would warrant such a conclusion. When a defendant is twenty percent more likely to receive the death penalty for committing a moderately aggravated homicide, for the sole reason

that his victim was white rather than black, *see id.* at 913–14, the system under which he is sentenced produces unreasonably inconsistent outcomes.

We need not decide precisely what degree of disparate impact would warrant condemning a capital punishment system because Andrews has not made a sufficient showing to call into question the overall fairness of the statutory scheme under which he received the death penalty. Constitutionally adequate procedures to direct and limit discretion in imposing the death penalty raise a presumption that a capital punishment law operates evenhandedly. *See McCleskey*, 753 F.2d at 897 (presumed that statute operates in constitutional manner). This presumption must be rebutted by proof of either random or systematically disparate sentencing patterns. Such proof should generally consist of an appropriately formal study that generates statistically significant results while accounting for the effect of other causal variables. *See, e.g.*, Gross & Mauro, Patterns of Death: An Analysis of Racial Disparities in Capital Sentencing and Homicide Victimization, 37 Stan.L.Rev. 27 (1984). Proffering such a study would create a "reasonable possibility" of establishing a basis for relief and therefore would entitle a federal habeas corpus petitioner to an evidentiary hearing under the principles of *Townsend v. Sain*. *See Ross*, 756 F.2d at 1495 n. 1 (Johnson, J., dissenting in part and concurring in part).

In this case, Andrews alleged the following in his habeas petition:

> "Three of the four persons presently under death sentence in Utah are black, although black people make up less than one percent (1%) of the population of Utah, and a small fraction of Utah murder defendants. Every person sentenced to death under the present Utah law has been an impoverished male whose alleged victim was caucasian. In every case tried under the present Utah statute in which a black person has been charged with murdering a white victim, the case has proceeded to a death sentencing phase; in all but one of those cases, a death sentence has been imposed. In no case in which a non-white person has been a victim of a capital homicide, has a death sentence been imposed, although numerous such cases have been eligible for capital sentences."

Rec., vol. VI, at 1112. The district court held that these small numbers preclude valid statistical analysis. On appeal, Andrews has submitted more current data showing that four of the seven individuals now on Utah's death row are black, still a small population. Although it may be correct that small numbers make predictions difficult, *see generally* Gross & Mauro, 37 Stan.L.Rev. at 93, we are not inclined to condone existing discrimination until enough others have been sentenced and executed to produce a population large enough to analyze. The existence of a small sample should not result in the denial of constitutional rights simply because of the time and place of a defendant's sentence.

However, a small population is not the only problem with Andrews' proffer. He has not developed the evidence that is available so as to provide some factual basis for relief. More importantly, Andrews has failed to address whether other causal factors, such as the degree of aggravation involved in the murders, might account for the sentences of the seven individuals now on Utah's death row. Having collected reports on cases in which the death penalty was withheld, Andrews has neither analyzed these data nor obtained less formal evidence of historical patterns of discriminatory sentencing in the twelve years since his original trial.

Absent careful analysis of sentencing patterns in Utah, we have no basis to conclude that anyone on death row is there because of systemic racial discrimination. In the Georgia study done in *McCleskey*, no sentencing disparity was shown based on the race of the defendant. *See McCleskey*, 753 F.2d at 899. Instead, a statistically disproportionate number of defendants received the death penalty when their victims were white rather than black. *Id.* at 896.

Moreover, the study showed that the race-of-the-victim disparity in Georgia was acute only in those cases where the degree of aggravation involved was in the mid-range. *Id.* In highly aggravated circumstances, the killers of both white and black victims were likely to receive in the death penalty. *Id.* Andrews himself participated in a crime that involved multiple killings and torture of the victims. None of his proffered evidence even remotely suggests the presence of racial discrimination where such highly aggravated murders are concerned. And nothing has been offered to show that the seven individuals on Utah's death row committed less aggravated murders.

[14] In Andrews' particular case, moreover, we find ample indication that the jury sentenced Andrews to death for reasons other than his race or the race of the victims. We have canvassed at length the procedural safeguards employed in this case. The court conducted extensive voir dire on the issue of race to ensure an unprejudiced jury. It gave proper instructions requiring the jury to focus on "the character of the individual and the circumstances of the crime." *See Zant*, 462 U.S. at 879, 103 S.Ct. at 2744. Andrews was permitted to introduce any evidence he chose in mitigation. Most importantly, Andrews' black co-defendant Roberts was not convicted of murder, which strongly indicates that the jury did not reach its verdict for reasons of race. Given these indicia of reliability in the jury's decision to give Andrews the death sentence, together with the absence of evidence indicating a racially disparate impact within the class of highly aggravated murders, we conclude that Andrews is not entitled to an evidentiary hearing on his claim of racially discriminatory sentencing.

V.

RETROACTIVITY OF *WOOD* DECISION

Andrews argues that the Supreme Court of Utah violated his federal constitutional rights when it applied retroactively its decision in *State v. Wood*, 648 P.2d 71, to capital cases pending on direct appeal but not to cases like his that were already final. While no specific standard for balancing aggravating and mitigating circumstances is constitutionally required, *Wood* established as a matter of state law that aggravating circumstances must outweigh mitigating circumstances beyond a reasonable doubt before the death penalty may be imposed. Andrews sought and was denied retroactive relief under this decision. *See Andrews III*, 677 P.2d 81. Three years later, the court applied *Wood* retroactively to cases which, unlike those of Andrews and Pierre, were pending on direct appeal when *Wood* was decided. *See State v. Norton*, 675 P.2d 577, 583–84 (Utah 1983), *cert. denied*, 466 U.S. 942, 104 S.Ct. 1923, 80 L.Ed.2d 470 (1984). Andrews contends that the court denied him equal protection by arbitrarily treating him differently from others similarly situated and that its actions were not based on established principles of retroactivity. We disagree.

[15, 16] The Constitution "neither prohibits nor requires" the retroactivity of judicial decisions. *Linkletter v. Walker*, 381 U.S. 618, 629, 85 S.Ct. 1731, 1737, 14 L.Ed.2d 601 (1965); *Great Northern Railway Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358, 364, 53 S.Ct. 145, 148, 77 L.Ed. 360 (1932). "A state in defining the limits of adherence to precedent may make a choice for itself between the principle of forward operation and that of relation backward." *Sunburst Oil*, 287 U.S. at 364, 53 S.Ct. at 148. Either choice affords due process of law. *Id.* at 363–64, 53 S.Ct. at 148.

[17] The Due Process and Equal Protection Clauses permitted the Utah court to distinguish between cases on direct appeal and those seeking collateral relief, and to apply *Wood* retroactively to one class but not the other.[11] The court drew a rational

11. Andrews also urges that racial bias accounts for the Utah Supreme Court's decisions. We

distinction in concluding that the State's interest in the finality of criminal convictions warranted retroactive application only to direct appeals. *See Norton*, 675 P.2d at 583–84; *cf. Shea v. Louisiana*, 470 U.S. 51, 105 S.Ct. 1065, 1070, 84 L.Ed.2d 38 (1985) (decision regarding illegal confessions applies retroactively to cases pending on direct appeal at time decision rendered). As a case of first impression, moreover, *Andrews III* conflicted with no Utah precedent concerning the retroactive application of judicial decisions to criminal cases that were already final. Andrews protests that he and Pierre alone did not receive the benefit of the standard announced in *Wood*. Although perhaps understandable, this argument is unpersuasive in light of the court's rational basis for drawing a distinction.[12]

[18] A direct challenge to the retroactivity analysis of *Andrews III* affords no additional basis for relief. Employing federal precedent for purposes of guidance, the Utah Supreme Court decided the issue of *Wood*'s retroactivity to Andrews' case as a matter of Utah law. *See Andrews III*, 677 P.2d at 88. It is settled that federal courts may not issue a writ of habeas corpus based upon a perceived error in such a decision. *Pulley*, 465 U.S. at 41, 104 S.Ct. at 874–75. Even if an exceptionally egregious error of state law could result in a denial of due process or equal protection, *see id.*, this is not such a case. The court confronted a question of first impression in Utah, exhaustively analyzed relevant federal cases, and reached a reasonable result. After examining the totality of the circumstances, we find nothing to suggest that the court's conclusion was dictated by this case rather than general principles of retroactivity. The court's conclusion therefore does not warrant federal judicial intervention.[13]

VI.

VALIDITY OF ANDREWS' DEATH SENTENCE UNDER *ENMUND V. FLORIDA*

Andrews finally contends that his death sentences should be overturned because he

reject this claim. Aside from the mistaken assertion that he and Pierre have been singled out for adverse treatment, *see infra* note 12, Andrews has proffered no evidence of the discriminatory intent presently required to prove a denial of equal protection, *see, e.g., Washington v. Davis*, 426 U.S. 229, 239–45, 96 S.Ct. 2040, 2047–50, 48 L.Ed.2d 597 (1976). Absent such evidence, we are confined to considering whether the court's decisions were so inconsistent or unfounded that they violate the Constitution irrespective of intent.

12. We note that, prior to *Wood*, death sentences apparently were imposed and affirmed on direct appeal in at least one other case involving the same standard under which Andrews and Pierre were sentenced. *See State v. Codianna*, 573 P.2d 343, 352 (Utah 1977) (consolidated appeals of three co-defendants), *cert. denied*, 439 U.S. 882, 99 S.Ct. 219, 58 L.Ed.2d 194 (1978); *see also State v. Brown*, 607 P.2d 261, 270 (Utah 1980) (adhering to same standard but reversing because no instruction given on burden of proof). Andrews makes the related point that, immediately after he and Pierre were sentenced, the state attorney general began to advise prosecutors to recommend a reasonable doubt standard. He appears to have taken this position, however, only after a later judicial opinion raised the subject and argued in favor of the more stringent standard. *See Brown*, 607 P.2d at 271–76 (Stewart, J., concurring in the judgment).

13. Andrews relies heavily upon *Hicks v. Oklahoma*, 447 U.S. 343, 100 S.Ct. 2227, 65 L.Ed.2d 175 (1980). Hicks was convicted of distributing heroin and sentenced under an Oklahoma statute mandating a 40-year prison term for certain habitual offenders. The state appeals court noted that this provision had been declared unconstitutional before Hicks was tried, yet upheld the 40-year term because it fell within the range of punishment which a jury might have imposed. In holding that due process had been violated, the Supreme Court emphasized that Hicks was deprived of a specific statutory right to have a jury fix his sentence on "the frail conjecture" that the result might have been the same had he been afforded this right. *See id.* at 345–46, 100 S.Ct. at 2229. Andrews was deprived of no such entitlement under Utah law. *Cf. Cabana v. Bullock*, — U.S. —, 106 S.Ct. 689, 697 n. 4, 88 L.Ed.2d 704 (1986). In *Andrews III*, the court considered whether he had a right to be resentenced under *Wood* and decided the question against him. *Hicks* is inapposite.

did not intend that life would be taken.[14] As we previously mentioned, the State agreed that we should wait for the decision in *Cabana v. Bullock*, — U.S. —, 106 S.Ct. 689, 88 L.Ed.2d 704 (1986), before deciding this issue.

[19, 20] The Eighth Amendment prohibits imposition of the death penalty upon one "who does not himself kill, attempt to kill, or intend that a killing take place or that lethal force will be employed." *Enmund v. Florida*, 458 U.S. 782, 797, 102 S.Ct. 3368, 3376, 73 L.Ed.2d 1140 *see also Cabana*, 106 S.Ct. at 693, 697. A death sentence may rest upon a guilty verdict which necessitates a finding of intent, *see Cabana*, 106 S.Ct. at 695–96, or upon appropriate factual findings made by a state trial judge or appellate court, *see id.* at 696–97. If such a finding has been made, it is presumed correct in subsequent federal habeas proceedings. *Id.* at 697–98. If not, a federal court must afford the state court an opportunity to make the requisite finding. *Id.* at 699–700.

This case was tried and presented to the jury on a theory of intentional or knowing murder rather than felony murder. *Compare Enmund*, 458 U.S. at 789–90 & n. 7, 102 S.Ct. at 3372–73 & n. 7 (noting requirement of culpable mental state to impose death penalty in Utah), *with Cabana*, 106 S.Ct at 696 (case tried on theory of felony murder). The trial judge told the jury in instruction 8 that the prosecution must prove four elements in order to convict Andrews of capital homicide: (1) that the victim was killed intentionally or knowingly, (2) that an aggravating circumstance was present, (3) that the killing occurred at a certain time and place, and (4) that the defendant either killed or was responsible as a "party" to the crime. *See* rec., vol. XVI, state trial rec., vol. R–3, at 351–53. Because Pierre shot and killed each of the victims, the extent of Andrews' culpability depends upon the circumstances under which the jury could have found him to be a party. The trial judge listed four such circumstances at the close of instruction 8:

> "[Andrews] would be a party to murder if:
>
> A. He actually and intentionally perpetrated the murder himself, or
>
> B. He intentionally helped plan or assisted in the advancement of the murder with intent that it would take place, and did not effectively withdraw before the killing.
>
> C. He intentionally rendered active advice during the murder, or
>
> D. He intentionally helped the murderer escape from the immediate scene of the crime.
>
> (The subject of 'party' is described in more detail in a later instruction)"

Id. at 352–53.

In instruction 12, the trial judge defined "party" in greater detail:

> "The statutes of Utah provide that: '*Every person, acting with the mental state required for the commission of an offense, who* directly commits the offense, who solicits, requests, commands, encourages, or *intentionally aids another person* to engage in conduct which constitutes an offense *shall be criminally liable as a party* for such conduct.'
>
> "To be a principal in the accomplishment of a crime where the person under consideration is not the actual doer of the crime, *such person's participation must be intentional and with an intent that his act will further, or cause the crime to come about*, or make easier its completion. A person is not a principal in the crime if he supplies automobiles or weapons to a criminal not knowing that a

14. The State mistakenly argues that Andrews did not preserve the claim that his sentence is excessive in light of the gravity of his offense because he did not intend that life would be taken. Although *Enmund* had yet to be decided, Andrews raised this issue on direct appeal and the Utah Supreme Court decided it. *See Andrews I*, 574 P.2d at 710–11; *accord Andrews II*, 607 P.2d at 818–20, 819 n. 9. The court again decided the merits of this issue on collateral attack in considering the retroactive applicability of *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). *See Andrews II*, 607 P.2d at 824. Andrews' *Enmund* claim may therefore be addressed.

crime is going to be accomplished, or not knowing the general criminal conduct planned by the person who has received the assistance. A person is a principal in a crime only if he intentionally has aided, encouraged, or assisted in its accomplishment. Assistance rendered after the crime is complete and escape from the immediate crime has been completed, does not make a person a principal of the crime even though he may be guilty of tampering with evidence or some other charge not here brought. In other words, if A commits a crime and B discovers that the crime has been committed and assists A in covering up the crime, B is not guilty as a principal because he is merely involved after the fact.

"A person is a party to a robbery, or rape, or theft, etc., and *he is also a party to the killing* that may occur therein, *only if he knew the killing was planned, or knew it was planned if certain events occur during the crime which does in fact occur*, because he has approved conduct containing a contingent plan to kill, *or if he knows certain co-parties plan to kill if certain contingencies occur*. He would not be a party to such a killing if he does not know of a plan to kill and only suspects such an event may possibly occur, but does not seriously expect it."

Id. at 357 (emphasis added). The trial judge thus instructed that a party must act with the same mental state as that required for commission of the murder, including intent, and the judge otherwise made clear that Andrews must have acted with knowledge that his acts were furthering a deliberate homicide. We note in addition that the judge's initial instruction on the elements of first degree murder, instruction 8, specifically referred to this supplementary instruction defining "parties"; that the judge further charged that his instructions should be considered as a whole and of equal importance regardless of their order, *see id.* at 370; and that the jurors had all of the instructions with them during their deliberations.

[21] In this context, we reject Andrews' arguments that the instructions permitted his conviction for first degree murder without a sufficient finding that he personally intended to kill or intended that life would be taken. He contends there are several alternative scenarios under which the jury could have convicted him without the requisite finding of intent. One alternative focuses upon instruction 13, in which the court instructed the jury that if one plans or assists in the planning of a murder, he has the affirmative duty of either informing the police or destroying his contribution to the crime in order to withdraw effectively and thereby avoid responsibility for capital homicide. *See infra* n. 15. Andrews argues that the jury could have impermissibly found him guilty of capital homicide even if he only assisted early in the crime and had a change of heart, but did not effectively withdraw within the meaning of instruction 13.[15] For the following reasons, we disagree.

Andrews' trial counsel argued in his closing remarks to the jury that while there may have been a plan to commit robbery, there was no premeditated plan to kill. He maintained that Pierre decided to kill only after the parents of two of the young shop

15. Instruction 13 provided in pertinent part:

"Once an individual indulges in planning or the assisting of criminal conduct he is responsible for the furtherance of that criminal conduct unless he has effectively withdrawn. In other words, if A and B plan a crime and A commits his assistance early in the crime, he would be responsible for B's completion of the crime even if A had a change of heart during the commission of the crime unless he effectively withdrew.... In other words, if A and B have planned a crime together and after the beginning of the plan A has supplied some of the ware for the crime or rendered some service during the crime he is responsible for the completion of the crime even though he has had a change of heart, unless he destroys the effectiveness or withdraws the assistance he has given such as the supplying of tools for the crime so that his services or his part in conduct is not in fact an asset of the perpetrator of the crime."

Rec., vol. XVI, state trial rec., vol. R-3, at 358.

workers unexpectedly arrived on the scene, and that Andrews left the premises without ever knowing Pierre's intention to dispose of the witnesses. As one alternative possibility, however, Andrews' counsel contended that if the jury believed Andrews became aware of Pierre's intention to kill, Andrews nonetheless immediately disassociated himself from that intention by leaving. In other words, Andrews' theory was that he never participated or assisted in a plan to kill and that he withdrew his physical presence as soon as he learned of Pierre's intentions, thus never forming the requisite intention. Thus, Andrews did not make a general objection to instruction 13, on withdrawal; he only objected specially that the example of supplying wares such as tools was too narrow. *See supra* note 15. In his objection, Andrews maintained that the example should be deleted, or broadened to include adding and then taking away one's physical presence as the assistance to the crime. The court further alluded to withdrawal in instruction 14 and instructed that "[a]ny verbal or physical acts of withdrawal may be considered by the jury in determining whether taken in total, the verbal and physical acts of an accused demonstrates a withdrawal by him from the criminal act." Rec., vol. XVI, state trial rec., vol. R-3, at 359. The state objected to this instruction on the ground that it overemphasized withdrawal, leaving us to conclude that Andrews sponsored the instruction.

No argument was made at trial or on appeal that even if Andrews formed an intent to kill, he changed his mind at the last minute. No instruction was requested by Andrews to permit the jury to reach such a conclusion. The argument throughout has instead been that the instructions permitted the jury to convict Andrews without finding he formed an intent to kill, and it is this conclusion with which we disagree. As we have previously concluded, Instruction 12 clearly required the jury to find that Andrews knew of the impending murders and that he had the same intention to kill as Pierre. Thus, Andrews' physical withdrawal from the basement was done with the understanding that Pierre fully intended to kill the victims that he, Andrews, had just helped to capture, bind, poison, and rob. Under these circumstances, the trial judge's instructions required a finding of culpability that comports fully with *Enmund*.

We also reject Andrews' contention that the jury could have convicted him under instruction 8 by finding that he intentionally rendered advice during the murder or intentionally helped the murderer escape, without also finding that he intended the murders to occur. Both of these alternatives do mention intent only with respect to *acts* which may have had the effect of assisting Pierre; neither necessarily implies any particular mental state with respect to *the murders* themselves. *See generally* W. LaFave & A. Scott, *Criminal Law* § 64, at 504-05 (1972). Yet the clear requirement of instruction 12 that a party must act "with the mental state required for the commission of an offense" and "with an intent that his act will further, or cause the crime to come about" negates the possibility that the jury could have convicted Andrews without also making the requisite finding that he intended the murders. The jury's failure to convict Roberts, who could readily be viewed as having intentionally assisted Pierre, confirms that the jury acted in accordance with the instructions as a whole and focused on Andrews' intent that the murders take place.

The implicit finding of Andrews' intent by a properly instructed jury, which must be presumed correct under *Cabana*, is supported by the record. Before the Hi-Fi robbery, Andrews said to an acquaintance that "one of these days I would like to rob a Hi Fi Shop and if anybody gets in my way I will kill them." Rec., vol. XVI, state trial rec., vol. T-9, at 1549. Andrews assisted Pierre in capturing and binding the eventual victims. When they begged for mercy, Pierre considered in Andrews' presence whether or not they should be killed. Andrews himself helped to administer what he either knew in advance to be Drano or discerned from the first victims' reactions

to be a poison capable of inflicting grievous harm or death. Andrews did say, "I'm scared. I can't do it." Notwithstanding that such statements may suggest an unwillingness to kill, they also support a clear inference that Andrews knew of Pierre's intention to do so. As Andrews was leaving the basement before the murders occurred, Pierre said to him "about thirty minutes," which further suggests an awareness of what was about to happen. Although Andrews apparently left the shop, someone returned shortly thereafter to pick up Pierre. Andrews also participated in disposing of the stereo equipment and other property stolen from the store. The jury could thus have inferred that Andrews fully acquiesced in the murders even though he himself did not commit them. Under *Enmund* and *Cabana*, the death sentence is not disproportionate to Andrews' knowledge of and participation in the offense.[16]

VIII.

CONCLUSION

We affirm the judgment of the district court denying Andrews' petition for a writ of habeas corpus. Because this is a capital case, when the final order of this court is entered, following the consideration of any rehearing petition that may be filed, we will stay our mandate and the execution of Andrews' death warrant for 30 days pending the filing of a petition for certiorari in the Supreme Court of the United States. If a petition for certiorari is filed within such time, then the stay of our mandate and of petitioner's execution will continue until disposition by the Supreme Court of the petition for certiorari.

16. Andrews also asserts that Utah's provision for execution before a firing squad violates the Establishment Clause of the First Amendment, and that this method of execution constitutes cruel and unusual punishment in violation of the Eighth Amendment. Andrews failed to present his Establishment Clause claim in the state courts, which constitutes a default subject to the cause and prejudice test. We conclude that this challenge does not state a colorable claim. Accordingly, we need not inquire whether this test has been met. *See Engle v. Isaac*, 456 U.S. 107, 120 n. 19, 102 S.Ct. 1558, 1567 n. 19, 71 L.Ed.2d 783 (1982). In addition, we find no merit in Andrews' Eighth Amendment claim. *See Andrews IV*, 600 F.Supp. at 431. Utah now allows defendants who have been sentenced to death to select either a firing squad or a lethal injection as the means of execution and mandates lethal injection if a defendant expresses no preference. *See* Utah Code Ann. § 77-18-5.5 (1986 Supp.).

MAY TERM - JUNE 8, 1987.

Before the Honorable Monroe G. McKay, Honorable Robert H. McWilliams and Honorable Stephanie K. Seymour, Circuit Judges.

WILLIAM ANDREWS,	)	
	)	
Petitioner-Appellant,	)	
	)	
vs.	)	NO. 84-2781 & 85-1024
	)	
KENNETH V. SHULSEN, Warden of the Utah State Prison, and DAVID L. WILKINSON, Attorney General of the State of Utah,	)	
	)	
Respondents-Appellees,	)	
	)	
WASHINGTON LEGAL FOUNDATION,	)	
	)	
Amicus Curiae.	)	

Appellant's petition for rehearing is denied.

ROBERT L. HOECKER, Clerk

By Patrick Fisher
Chief Deputy Clerk

APPENDIX B

1973 Utah Death Sentencing Statutes

Utah Capital Murder and Capital Sentencing Statutes

At the time of petitioner's trial and sentencing, the Utah statutes provided as follows:

Utah Code Annotated < 6-5-202 (1973):[1]

Murder in the first degree.

(1) Criminal homicide constitutes murder in the first degree if, under circumstances not constituting manslaughter, the actor intentionally or knowingly causes the death of another under any of the following circumstances:

(a) The homicide was committed by a convict under sentence of imprisonment.

(b) At the time the homicide was committed the actor also committed another homicide.

(c) The actor knowingly created a great risk of death to a person other than the victim and the actor.

(d) The homicide was committed while the actor was engaged in the commission of, or an attempt to commit, or flight after committing or attempting to commit, robbery, rape, forcible sodomy, or aggravated sexual assault or arson, burglary, or kidnapping.

(e) The homicide was committed for the purpose of avoiding or preventing an arrest by a peace officer acting under color of legal authority or for the purpose of effecting an escape from lawful custody.

(f) The homicide was committed for pecuniary or other personal gain.

(g) After having previously been convicted of first or second degree murder.

(h) The homicide was committed upon a child under the age of twelve years as the result of physical abuse or neglect . . .

(2) Murder in the first degree is a capital offense.

Utah Code Annotated < 6-3-206 (1973):[2]

Death or life imprisonment.

A person who has been convicted of a capital felony shall be sentenced in accordance with section 76-3-207, and sentence shall be death or life imprisonment as the court or jury, in accordance with this section, shall determine.

---

[1] Since petitioner's trial, this section has been amended to remove the reference to "circumstances not constituting manslaughter" in paragraph (1), change the language of subsection (d), delete subsection (h) and a related paragraph, and add circumstances to the roster of enumerated circumstances. See Utah Code Ann. < 6-5-202(1) (1986 Supp.) & Compiler's Note; Compiler's Note to Utah Code Ann. < 6-5-202 (1978).

[2] Utah Code Ann. < 6-3-206 was amended in 1977, re-codifying the previous version as subsection (1) and adding a new subsection (2) that provides for "automatic review" of "[t]he judgment of conviction and sentence of death . . . by the Utah State Supreme Court." See Utah Code Ann. < 6-3-206 (1978) & Compiler's Note.

Utah Code Annotated < 6-3-207 (1973):[3]

Capital felony--Hearing on sentence.

(1) When a defendant has been found guilty of a capital felony, there shall be further proceedings before the court or jury on the issue of penalty. The proceedings shall be conducted before the court or jury which found the defendant guilty, provided the defendant may waive hearing before the jury, in which event the hearing shall be before the court. In these proceedings, evidence may be presented as to any matter the court deems relevant to sentence, including but not limited to the nature and circumstances of the crime, the defendant's character, background, history, mental and physical condition, and any other facts in aggravation or mitigation of the penalty. Any evidence the court deems to have probative force may be received regardless of its admissibility under the exclusionary rules of evidence. The state's attorney and the defendant shall be permitted to present argument for or against sentence of death. Aggravating circumstances shall include those as outlined in 76-5-202. Mitigating circumstances shall include the following:

(a) The defendant has no significant history of prior criminal activity;

(b) The murder was committed while the defendant was under the influence of extreme mental or emotional disturbance;

(c) The defendant acted under extreme duress or under the substantial domination of another person;

(d) At the time of the murder, the capacity of the defendant to appreciate the criminality (wrongfulness) of his conduct or to conform his conduct to the requirement of law was substantially impaired as a result of mental disease, intoxication, or influence of drugs;

(e) The youth of the defendant at the time of the crime;

(f) The defendant was an accomplice in the murder committed by another person and his participation was relatively minor;

(g) And any other fact in mitigation of the penalty.

(2) The court or jury, as the case may be, shall retire to consider the penalty. In all proceedings before a jury, under this section, it shall be instructed as to the punishment to be imposed upon a unanimous verdict for death and that to be imposed if a unanimous verdict for death is not found. If the jury reports unanimous agreement to impose the sentence of death, the court shall discharge the jury and shall impose the sentence of death. If the jury is unable to reach a unanimous verdict imposing the sentence of death, the court shall discharge the jury and impose the sentence of life imprisonment.

(3) Upon any appeal by the defendant where the sentence is of death, the supreme court, if it finds prejudicial error in the sentencing proceeding only, may set aside the sentence of death and remand the case to the trial court, in which event the trial court shall impose the sentence of life imprisonment.

---

[3] Amendments to Utah Code Ann. < 6-3-207 in 1982 rendered the provisions applicable to cases in which the defendant pled guilty to a capital felony, established procedures for re-sentencings in cases in which the sentence of death was set aside on appeal, and re-numbered the paragaraphs. See Utah Code Ann. < 6-3-207 (Supp. 1986) & Compiler's Note.

(4) In the event the death penalty in a capital felony is held to be unconstitutional by the Utah supreme court or the United States supreme court, the court having jurisdiction over a person previously sentenced to death for a capital felony shall cause such person to be brought before the court, and the court shall sentence the person to life imprisonment, and any person who is thereafter convicted of a capital felony shall be sentenced to life imprisonment.

APPENDIX C

Instructions to the Jury at the Sentencing Phase

IN THE DISTRICT COURT OF DAVIS COUNTY, UTAH

- - - - - - - - - - - - - - - -

THE STATE OF UTAH, Plaintiff, vs KEITH ROBERTS, DALE PIERRE, WILLIAM ANDREWS, Defendants.	)	INSTRUCTIONS TO THE JURY ON SENTENCING Case No. 2122

- - - - - - - - - - - - - - - -

MEMBERS OF THE JURY:

No. 1.

It is the duty of the court to instruct you in the law that applies to the sentence procedure, and it is your duty, as jurors, to follow the law as I state it to you, regardless of what you personally believe the law is or ought to be. On the other hand, it is your exclusive province to determine the sentence in this case, and you should consider and weigh the factors mentioned in this instruction for that purpose. You may use the instructions given you in the case as they apply.

No. 2.

You are instructed that it would be improper for you to again debate the question of guilt or innocence of any defendant already found guilty. There is no fixed standard as to the degree of persuasion needed for a particular sentence, as the law leaves that consideration to the jury but the burden of proof to satisfy the jury that a death sentence is appropriate is on the State.

No. 3.

The jury, when considering a sentence, has a right to know how said sentence might be carried out.

The law of Utah reads:

> "The punishment of death must be inflicted by hanging the defendant by the neck until he is dead, or by shooting him, at his election. If the defendant neglects or refuses to make election, the court at the time of passing the sentence must declare the mode and enter the same as a part of the judgment, together with the court's setting of a date for the act."

A judgment of death must be executed by the warden of the state prison, within the interior walls of the state prison. The Board of Corrections of the state prison shall provide the necessary apparatus for the execution.

The warden must invite the presence of a physician and the county attorney of the county; and he shall, at the request of the defendant, permit such ministers of the gospel, not exceeding two, as the defendant may name, and any persons, relatives or friends, not to exceed five, to be present at the execution, that he wishes to be present. Together with such peace officers as the warden may think expedient to witness the execution, but no other persons than those mentioned in this section shall be present at the execution, nor shall any person under age be permitted to witness the same.

In the event you judge a sentence of life, the confinement shall be at the Utah State Prison. Whether a defendant sentenced to life actually serves his life or is released is within the province of the Board of Pardons as that board has total control over the length of such a sentence.

No. 4.

The jury may consider all evidence received by it during the trial itself and shall be judge of whether that evidence does or does not contain material which is helpful to the jury in determining what the sentence should be under these instructions. The jury should also consider all evidence which it has received during this proceeding. The jury should not consider nor be influenced by any information not presented in either the trial itself or during this sentencing proceeding, and should not be influenced in any way by any news reports, rumor, or other information which has reached the jurors, because each side has a right to challenge the evidence reaching the jury, and each side can do so only if they are fully aware of it.

You may consider the nature and circumstances of the crime, the character of the defendant, his background, his general personal history, his mental and physical condition, and other factors.

You may consider

(a) Whether or not the defendant has any significant history of prior criminal activity;

(b) Whether or not murder was committed while the defendant was under the influence of any mental or emotional disturbance or duress;

(c) Whether or not the defendant acted under duress or substantial domination of another person;

(d) The general capacity of the defendant to appreciate the wrongfulness of his conduct, or the ability to conform his conduct to the standards required by law and whether or not such capacity was substantially impaired as a result of any mental disease, or intoxication;

(e) The youth of the defendant at the time of the crime;

(f) Whether or not the defendant was a party to the murder committed by another person and whether his participation was relatively minor or major;

(g) Any other factor in mitigation or aggravation that would be considered by a responsible person making such a decision in an appropriate manner.

No. 5.

You are instructed that you should not attempt to represent the views of the community as a legislator might do for his constituents, but are to fix the sentence which you as an individual believe is appropriate.

No. 6. You are instructed that you need not pass the same sentence against both defendants, but should decide each case with the same seriousness as you would if it were the only matter before you at this proceeding. You also must fix an appropriate sentence for each count of the verdict of first degree murder. This does not mean that you may not consider whether or not multiple murders were committed in determining the sentence for any one count, because you may do so, but if counts of first degree murder are returned by the jury, which counts are not necessarily a part of one general act, the jury could in proper cases render a different type of sentence for each. The court does not now know, and perhaps will never know, the exact theory each juror acted on in its verdict.

While it may appear to be unnatural to reach inconsistent sentences on different counts as to one defendant, in the event that some type of appellate procedure upsets your conviction of one count or error or further evidence was discovered that upsets the conviction of one count but the other counts and conviction thereon remain, the sentence could then be carried out as to the remaining count or counts.

Your proceeding should be presided over by your foreman, as it should record your findings as to each count as to each defendant. Each count is identified on the verdict form. Below is a

place where you would designate your sentence as presented. It reads as follows:

The defendant is sentenced to death_____.

The defendant is sentenced to life imprisonment_____.

The jury is unable to reach a verdict_____.

You are instructed that it requires the unanimous concurrence of all twelve (12) jurors to render a sentence of either life or death. In the event you you are unable to reach a verdict, the court is required by law to enter a verdict of life imprisonment.

Each juror must make his own decision as to what the sentence should be but should do so only after consideration of appropriate factors with his fellow jurors. He should not hesitate to change when earlier impressions were erroneous. No juror should, however, agree to any sentence which does not represent his own judgment on the matter.

No. 7.

The constitution and laws of this state absolutely prohibit the trial judge from making any comment about the witnesses or the evidence and I am not in any way permitted to assist you in determining what is or is not the truth in this case.

Therefore, you are instructed that if during this trial I have said or done anything which has suggested to you that I am inclined to favor the claim or position of either party, you are not to permit yourselves to be influenced by any such suggestion.

I have not intended to indicate any opinion as to which witnesses are, or are not, worth of belief, nor which party should prevail. If any expression of mine has seemed to indicate an opinion relative to any of these matters, you should disregard it, because you are the sole and only judges of the facts.

Dated this _____ day of November 1974.

_____
Judge

APPENDIX D

Verdicts on Guilt and Sentence

IN THE DISTRICT COURT OF [redacted] COUNTY, UTAH

THE STATE OF UTAH,

Plaintiff,

-vs-

WILLIAM ANDREWS,
DALE SELBY PIERRE,
KEITH LEON ROBERTS,

Defendants.

VERDICT

Case No. 2122

We the jury empanelled in the above-entitled action render the verdict as follows in the case of WILLIAM ANDREWS:

COUNT I

CRIMINAL HOMICIDE, MURDER IN THE FIRST DEGREE, A Capital Offense committed as follows, to-wit: Said defendant murdered Carol Naisbitt.

Guilty as charged First Degree Murder ✓

Not Guilty _____

COUNT II

CRIMINAL HOMICIDE, MURDER IN THE FIRST DEGREE, A Capital Offense committed as follows, to-wit: Said defendant murdered Stanley Walker.

Guilty as charged First Degree Murder ✓

Not Guilty _____

COUNT III

CRIMINAL HOMICIDE, MURDER IN THE FIRST DEGREE, A Capital Offense committed as follows, to-wit: Said defendant murdered Michelle Ansley.

Guilty as charged First Degree Murder ✓

Not Guilty _____

COUNT IV

AGGRAVATED ROBBERY, A First Degree Felony committed as follows, to-wit: Said defendant robbed STANLEY O. WALKER, and in the course of committing the robbery, used a deadly weapon, to-wit: a gun.

Guilty as charged of Aggravated Robbery ✓

Not Guilty _____

COUNT V

AGGRAVATED ROBBERY, A First Degree Felony committed as follows, to-wit: Said defendant robbed CHARLES W. WALKER, and in the course of committing the robbery, used a deadly weapon, to-wit: a gun.

Guilty as charged of Aggravated Robbery ✓

Not Guilty _____

Dated this 15th day of November, 1974

Marvin L. Mortensen

Foreman

IN THE DISTRICT COURT OF Weber COUNTY, UTAH

- - - - - - - - - - - - - - - -

THE STATE OF UTAH,	)	
Plaintiff,	)	Case No. 2122
vs	)	VERDICT ON SENTENCE
KEITH ROBERTS, DALE PIERRE, WILLIAM ATCHLEY,	)	
Defendant.	)	

- - - - - - - - - - - - - - - -

We the jury fix sentence as follows as to defendant

WILLIAM ATCHLEY.

COUNT I

CRIMINAL HOMICIDE, MURDER IN THE FIRST DEGREE, a Capital Offense committed as follows: to-wit: Said defendant murdered Carol Reisbitt.

The defendant is sentenced to death ✓.

The defendant is sentenced to life imprisonment_____.

The jury is unable to reach a verdict_____.

COUNT II

CRIMINAL HOMICIDE, MURDER IN THE FIRST DEGREE, A Capital Offense committed as follows, to-wit: Said defendant murdered Stanley Walker.

The defendant is sentenced to death ✓.

The defendant is sentenced to life imprisonment_____.

The jury is unable to reach a verdict_____.

COUNT III

CRIMINAL HOMICIDE, MURDER IN THE FIRST DEGREE, A Capital Offense committed as follows, to-wit: Said defendant murdered Michelle Ansley.

The defendant is sentenced to death ✓.

The defendant is sentenced to life imprisonment_____.

The jury is unable to reach a verdict_____.

Dated this 25th day of November 1974.

419

Marvin L. Mortensen
Foreman

APPENDIX E

Affidavit Containing Petitioner's Proffered Evidence
Regarding Racial Discrimination in Utah Death Sentencing

No. 84-2781

IN THE UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

WILLIAM ANDREWS,

Petitioner/Appellant,

v.

KENNETH V. SHULSEN, Warden of the Utah State Prison, and DAVID L. WILKENSEN, Attorney General of the State of Utah,

Respondents/Appellees.

AFFIDAVIT SUPPORTING MOTION TO SUPPLEMENT THE RECORD, AND PROFFER OF EVIDENCE REGARDING PETITIONER'S CLAIM OF RACE DISCRIMINATION

TIMOTHY K. FORD
600 Pioneer Building
Seattle, WA 98104
(206) 622-5942

ATTORNEY FOR PETITIONER/APPELLANT

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ATTORNEY FOR PETITIONER

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

WILLIAM ANDREWS, Petitioner/Appellant, v. KENNETH V. SHULSEN, Warden of the Utah State Prison, and DAVID L. WILKENSEN, Attorney General of the State of Utah, Respondents/Appellees.	:	No. 84-2781 AFFIDAVIT SUPPORTING MOTION TO SUPPLEMENT THE RECORD, AND PROFFER OF EVIDENCE REGARDING PETITIONER'S CLAIM OF RACE DISCRIMINATION

STATE OF WASHINGTON)
) ss.
County of King)

TIMOTHY K. FORD, on oath, deposes and says:

I am the attorney for William Andrews, and have been at all stages of the proceedings in this case in this Court and in the District Court below. I make this affidavit in support of the Petition for Rehearing from this Court's decision of October 6, 1986, which rejected Petitioner's claim that he should have been afforded an evidentiary hearing on his claims of arbitrariness and race discrimination in the administration of the Utah death sentencing statute.

1. The Procedural History of This Issue Below.

The absence of any evidence, or a proffer of evidence, regarding the race discrimination claims in this case is the result of the District Court's unusual treatment of this issue in the proceedings below.

In June 1981, the District Court granted an evidentiary hearing on the claims of arbitrariness and race discrimination contained in the original Petition for Habeas Corpus filed in this case. The evidentiary hearing did not occur at that time, because the District Court required the Petitioners to file a state habeas corpus petition regarding the application to their case of the Utah Supreme Court's decision later reported as State v. Wood, 648 P.2d 71 (Utah, 1981).

After the Utah Supreme Court denied relief on that Petition, proceedings in the District Court on all issues were renewed. An Amended Petition was filed and Memoranda were filed on both sides, which were limited by the District Court's order to "simply new law". R. XII:11. The Respondent's Memorandum filed at that time asserted primarily that all Petitioner's claims should be dismissed as a matter of law; only as one of many alternative arguments suggesting that a proffer of evidence should be a prerequisite to a hearing. Although the District Court had already granted a hearing, in response, I specifically offered to present a proffer a summary of the evidence on this claim if the District Court required one. Pet. Reply Memo., R. 1411; R. XII:71.

In its Order granting the Respondent's motion, and dismissing the Petition without a hearing, the District Court said nothing about the absence of a proffer. As I understood it, it ruled as a matter of law that race discrimination could not be shown by statistical disparities in the state of Utah, because of the small number of death sentences that had been imposed.

This sequence of events presented no occasion for me to compile and proffer evidence in support of Petitioner's race discrimination claim at any time in the District Court. In this Court, I argued that the District Court was wrong as a matter of law to refuse a hearing because of the small number of cases available. This Court apparently agreed with that position, but nonetheless affirmed the District Court, assuming that the proof Petitioner would have presented was not sufficiently formal and comprehensive, and could not have shown discrimination in cases comparable to William Andrews'.

I believe that assumption is based on the fact that the Court has not has the opportunity to examine the evidence Petitioner would have presented. So it can, since receiving the Court's opinion I have attempted to retrieve and compile the available evidence in a form which this Court could examine. This Affidavit contains that evidence I have been able to put in comprehensible form through these efforts in the time available.

2., The Available Evidence.

The evidence that could have been presented at a hearing on race discrimination in the District Court came from several sources.

a. The Sources of Statistical Evidence.

i. The Prosecutor's Questionnaires.

As part of the discovery process preparatory to the hearing scheduled in 1980, questionnaires were sent out to local County Attorneys by the Attorney General of Utah, requesting information on first and second degree murder cases which had occurred since the effective date of the Utah death sentencing law, in 1973. Copies of the completed questionnaires were provided to Petitioner's counsel through discovery in the District Court.

These questionnaires requested information on a number of variable in each case: the initial charge filed; any aggravating circumstances included in the charge; any plea bargain; the level of conviction and the sentence imposed; any evidence of aggravating and mitigating circumstances presented at a penalty hearing; whether the case was tried to a judge or a jury; the verdict; the defendant's age, race, sex, economic and social status, mental and physical condition, background, prior criminal record, and involvement in the homicide; the number of victims, their names, ages, sex, economic and social status, the location of the crime, a narrative description of it, the presence of any torture, extended period of capture, prolongment of the killing, contemporaneous crimes, injuries to others than the victim, and

other facts in aggravation; and the presence of any of Utah's statutory mitigating circumstances, or other mitigating circumstances recognized by law. These questionnaires did not request two critically important items of information--the victim's race, and the precise date of the offense.

In order to supplement the information thus provided by the Respondent in discovery, I hired a law student to act as an investigator, to obtain information on cases in jurisdictions which had not responded to the Attorney General's requests, and to add in information on variables which were not included in those forms which were provided by the Respondent, to the extent possible. I also obtained information from the Utah Department of Vital Statistics, which keeps information on homicide victimization in the state of Utah, on all homicide deaths from 1973 to 1981. This information, which is available in computer-generated form, contains data on a number of facts about the victim of the crime and the circumstances of their death.

I have periodically supplemented this information with additional cases involving individuals who have been charged or convicted of first degree murder in the state of Utah, which have come to my attention since the time the data was gathered in 1981 from discussions with other lawyers and published case reports, to the extent possible without funding or expert assistance.

ii. F.B.I. Uniform Crime Reports.

The Federal Bureau of Investigation Uniform Crime Reporting Division keeps homicide statistics from the state of Utah, as it does in other states. The F.B.I. Uniform Crime Reports Supplemental Homicide Reports includes information on all homicides known to police in the state of Utah during the subject period, as well as several other variables: the race and sex of the defendant and the victim, whether or not a firearm was used, whether or not the defendant and the victim were related in any way, and whether the homicide was committed under felony circumstances.

Dr. William Bowers, a noted expert in this field, was one of the experts Petitioner would have called in the District Court. As part of his research in this area, Dr. Bowers keeps computer tapes containing the F.B.I. Uniform Crime Reports data, for all states, including Utah, for the period 1976 (when information regarding the defendant was first added to this data base) until 1983. To supplement and update these data, after this Court's decision, I obtained summary reports from the F.B.I. Uniform Crime Reporting Division in Salt Lake City, regarding homicides during the years 1984 through 1985. It was not possible to obtain information which could be subjected to a complete computer analysis for this period, before the Petition for Rehearing was due in this case. However, I asked Dr. Bowers to provide me with a summary of this data, containing the distributions of all cases for the period 1976 to 1983, and a

weighted distribution designed to approximate the figures for the period July 1, 1973 to December 31, 1985. He did so.

iii. Other Information.

After the District Court's Order in June, 1981, I interviewed several witnesses regarding the question of racial prejudice in the community, and surrounding the defendant's trial, and racial prejudice generally in the administration of Utah's homicide sentencing laws. These included criminal defense lawyers and former prosecutors with experience in Utah homicide cases. The evidence I obtained and prepared to present through these latter witnesses included testimony and documents regarding highly aggravated homicide cases in which white defendants received sentences of less than death in the state of Utah under the present statute.

2. The Evidence of Statistical Disparities.

To the extent possible since I obtained this Court's opinion on October 9, 1986, without funds to retain full-time expert assistance, I have endeavored to compile and summarize the statistical evidence of racial disparities in the state of Utah, obtained from these sources in a form which could be included in this proffer. The following tables, showing these racial disparities, have been prepared by me from the information available, and accurately reflect that data to the best of my knowledge and ability.

The disparities shown between black and white defendant cases in these various tables have been analyzed by a qualified

statistical expert, according to the method for determining the statistical significance of such data described in Gross & Mauro, Patterns of Death: An Analysis of Racial Disparities in Capital Sentencing and Homicide Victimization, 37 STAN.L.REV. 27, 146 (1984). Disparities marked with an asterisk (*) are statistically significant at the $P \leq .05$ level; disparities marked with two asterisks (**) are statistically significant at the $P \leq .01$ level; disparities marked with three asterisks (***) are statistically significant at the $P \leq .001$ level.

a. The F.B.I. Supplemental Homicide Data.

The following tables summarize comparisons between the total numbers of homicides included in the weighted Uniform Crime Reports Data provided to me by Dr. Bowers, and the individuals that Utah presently holds under death sentence, or has executed since 1973. The tables divide cases according to the race of the victim and the defendant, and show the numerical and ratio disparities between black defendant and white defendant cases, and between black victim and white victim cases, in each row and column.[1]

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[1] This format is derived from tables presented by Professor David Baldus, in Exhibits DB 17, McCleskey v. Kemp, U.S.D.C. D.Ga. No. C-81-2434A.

ALL CASES

RACE OF DEFENDANT AND VICTIM DISPARITIES IN DEATH SENTENCING RATIOS, ALL WEIGHTED U.C.R. CASES AND DEATH ROW STATISTICS.

	Race of Victim		
Race of Defendant	White Victim	Black Victim	Difference
Black Defendant	.25 (4/20)	0.0 (0/23)	25 points
White Defendant	.01 (4/389)	0.0 (0/4)	1 point
Difference	***24 points	0 points	
Ratio	25 to 1	-	

FEMALE VICTIM

RACE OF DEFENDANT AND VICTIM DISPARITIES IN UTAH DEATH SENTENCING RATIOS IN FEMALE VICTIM CASES: WEIGHTED U.C.R. DATA AND DEATH ROW STATISTICS.

	Race of Victim		
Race of Defendant	White Victim	Black Victim	Difference
Black Defendant	.60 (3/5)	0 (0/8)	60 points
White Defendant	.01 (1/99)	0 (0/0)	1 point
Difference	***59 points	0 points	
Ratio	60 to 1	-	

USE OF A FIREARM

RACE OF DEFENDANT AND VICTIM DISPARITIES IN UTAH DEATH SENTENCING RATIOS IN CASES INVOLVING FIREARMS: WEIGHTED U.C.R. DATA AND DEATH ROW STATISTICS.

	Race of Victim		
Race of Defendant	White Victim	Black Victim	Difference
Black Defendant	.33 (3/9)	.0 (0/18)	33 points
White Defendant	.01 (3/222)	.0 (0/3)	1 point
Difference	**32 points	0 points	
Ratio	24 to 1	-	

STRANGER VICTIM

RACE OF DEFENDANT AND VICTIM DISPARITIES IN UTAH DEATH SENTENCING RATIOS IN CASES INVOLVING STRANGER VICTIMS: WEIGHTED U.C.R. DATA AND DEATH ROW STATISTICS.

	Race of Victim		
Race of Defendant	White Victim	Black Victim	Difference
Black Defendant	.60 (3/5)	.0 (0/2)	60 points
White Defendant	.01 (1/103)	.0 (0/2)	1 point
Difference	***59 points	0 points	
Ratio	60 to 1	-	

FELONY CIRCUMSTANCE

RACE OF DEFENDANT AND VICTIM DISPARITIES IN UTAH DEATH SENTENCING RATIOS, FELONY CIRCUMSTANCES: WEIGHTED U.C.R. DATA AND DEATH ROW STATISTICS.[2]

	Race of Victim		
Race of Defendant	White Victim	Black Victim	Difference
Black Defendant	1.00+ (4/2)	.0 (0/0)	100 points
White Defendant	.05 (4/68)	.0 (0/0)	5 points
Difference	.95+	0	
Ratio	19+ to 1	-	

MULTIPLE VICTIMS

RACE OF DEFENDANT AND VICTIM DISPARITIES IN UTAH DEATH SENTENCING RATIOS, CASES INVOLVING MULTIPLE VICTIMS: WEIGHTED U.C.R. DATA AND DEATH ROW STATISTICS (see Note 2).

	Race of Victim		
Race of Defendant	White Victim	Black Victim	Difference
Black Defendant	100+ (2/0)	.0 (0/0)	100+ points
White Defendant	.15 (3/20)	.0 (0/0)	15 points
Difference	85+ points	0	
Ratio	6+ to 1	-	

2 Apparently because of missing data in the F.B.I. Uniform Crime Reports, and the high frequency of death sentencing among black defendants with white victims, the proportions in several of these tables--those involving felony circumstances, multiple victims, and aggravation levels greater than or equal to 2--exceed 1.00. In these tables, these proportions are expressed as 1.00+. Analyses of statistical significance have not been done on these tables, because of this deficiency in the data.

The following tables control for level of aggravation, according to the scale proposed in Gross & Mauro, Patterns of Death, 37 Stan.L.Rev. 27, 70 (1984).

AGGRAVATION LEVEL 1+

RACE OF DEFENDANT AND VICTIM DISPARITIES IN UTAH DEATH SENTENCING RATIOS, CONTROLLING FOR U.C.R. AGGRAVATION LEVEL (GREATER THAN OR EQUAL TO 1) AND THE RACE OF THE VICTIM: WEIGHTED U.C.R. DATA AND DEATH ROW STATISTICS.

	Race of Victim		
Race of Defendant	White Victim	Black Victim	Difference
Black Defendant	.80 (4/5)	.0 (0/2)	80 points
White Defendant	.03 (4/133)	.0 (0/2)	3 points
Difference	***77 points	0 points	
Ratio	26.6 to 1	-	

AGGRAVATION LEVEL 2+

RACE OF DEFENDANT AND VICTIM DISPARITIES IN UTAH DEATH SENTENCING RATIOS, CONTROLLING FOR THE U.C.R. AGGRAVATION LEVEL (GREATER THAN OR EQUAL TO 2), AND THE RACE OF THE VICTIM: WEIGHTED U.C.R. DATA COMBINED WITH DEATH ROW STATISTICS (see Note 2).

	Race of Victim		
Race of Defendant	White Victim	Black Victim	Difference
Black Defendant	1.00+ (3/2)	.0 (0/0)	60 points
White Defendant	.05 (3/56)	-	-
Difference	95+ points	-	
Ratio	12+ to 1	-	

b. The Supplemented Prosecutor's Questionnaire Data.

The following tables have been prepared from data obtained in the questionnaire research done in preparation for the hearing below, supplemented by the additional cases known to counsel. A full list of the cases and the variables summarized here is attached as Exhibit A to this affidavit. Levels of statistical significance have been calculated for these tables in the same manner as described above, and the level of statistical significance so calculated is indicated by asterisks in the same manner as in the preceding tables.

i. All Cases.

ALL CASES

RACE OF DEFENDANT AND VICTIM DISPARITIES IN UTAH DEATH SENTENCING RATIOS--ALL CASES: SUPPLEMENTED PROSECUTOR'S QUESTIONNAIRE DATA.

	Race of Victim		
Race of Defendant	White Victim	Black Victim	Difference
Black Defendant	.30 (4/13)	.0 (0/11)	30 points
White Defendant	.02 (4/198)	.0 (0/7)	2 points
Difference	***28 points	0	
Ratio	15 to 1	-	

DEFENDANTS CONVICTED OF MURDER ONLY

RACE OF DEFENDANT AND VICTIM DISPARITIES IN UTAH DEATH SENTENCING RATIOS--DEFENDANTS CONVICTED OF MURDER: SUPPLEMENTED PROSECUTOR'S QUESTIONNAIRE DATA.

	Race of Victim		
Race of Defendant	White Victim	Black Victim	Difference
Black Defendant	.66 (4/6)	0 (0/3)	66 points
White Defendant	.05 (4/91)	0 (0/4)	5 points
Difference	***61 points	0	
Ratio	15 to 1	-	

FIRST DEGREE MURDER CHARGE OR FELONY CIRCUMSTANCE

RACE OF DEFENDANT AND VICTIM DISPARITIES IN UTAH DEATH SENTENCING RATIOS--CASES INVOLVING A FIRST DEGREE MURDER CHARGE AND/OR FELONY CIRCUMSTANCE: SUPPLEMENTED PROSECUTOR'S QUESTIONNAIRE DATA.

	Race of Victim		
Race of Defendant	White Victim	Black Victim	Difference
Black Defendant	.50 (4/8)	0 (0/5)	50 points
White Defendant	.04 (4/103)	0 (0/4)	4 points
Difference	***46 points	0	
Ratio	12.5 to 1	-	

FIRST DEGREE CHARGE AND/OR FELONY CIRCUMSTANCE
AND PRIOR CONVICTION

RACE OF DEFENDANT AND VICTIM DISPARITIES IN UTAH DEATH SENTENCING RATIOS--CASES INVOLVING FIRST DEGREE MURDER CHARGES AND/OR FELONY CIRCUMSTANCES AND DEFENDANTS WITH PRIOR CONVICTIONS: SUPPLEMENTED PROSECUTOR'S QUESTIONNAIRE DATA.

	Race of Victim		
Race of Defendant	White Victim	Black Victim	Difference
Black Defendant	.66 (2/3)	.0 (0/2)	66 points
White Defendant	.06 (3/51)	.0 (0/3)	6 points
Difference	*60 points	0	
Ratio	11 to 1	-	

FIRST DEGREE CHARGE AND/OR FELONY CIRCUMSTANCE
DEFENDANTS UNDER 21

RACE OF DEFENDANT AND VICTIM DISPARITIES IN UTAH DEATH SENTENCING RATIOS--CASES INVOLVING FIRST DEGREE MURDER CHARGES AND/OR FELONY CIRCUMSTANCES, AND DEFENDANTS UNDER 21: SUPPLEMENTED PROSECUTOR'S QUESTIONNAIRE DATA.

	Race of Victim		
Race of Defendant	White Victim	Black Victim	Difference
Black Defendant	.50 (1/2)	.0 (0/0)	50 points
White Defendant	.00 (0/21)	.0 (0/2)	0 points
Difference	50 points[3]	0	
Ratio	infinite	-	

[3] Statistical significance cannot be computed where one of the cells is empty.

HIGH AGGRAVATION CASES

RACE OF DEFENDANT DISPARITIES IN UTAH DEATH SENTENCING RATIOS--CASES INVOLVING FIRST DEGREE MURDER CHARGES AND/OR FELONY CIRCUMSTANCES, RESULTING IN MURDER CONVICTIONS, AND INVOLVING A RISK TO OTHERS OR MULTIPLE VICTIMS, AND APPARENT TORTURE, SUPPLEMENTED PROSECUTOR'S QUESTIONNAIRE DATA.

	All Victims[4]
Black Defendant	1.00 (2/2)
White Defendant	.16 (1/6)
Difference	84 points
Ratio	6 to 1

HIGHLY AGGRAVATED CASES WITH MITIGATION

RACE OF DEFENDANT DISPARITIES IN UTAH DEATH SENTENCING RATIOS--CASES INVOLVING FIRST DEGREE MURDER CHARGES AND/OR FELONY CIRCUMSTANCES, RESULTING IN MURDER CONVICTIONS, AND INVOLVING A RISK TO OTHERS OR MULTIPLE VICTIMS, AND APPARENT TORTURE, AND DEFENDANT UNDER 21 OR NONTRIGGERMAN: SUPPLEMENTED PROSECUTOR'S QUESTIONNAIRE DATA.

	All Victims
Black Defendant	1.00 (1/1)
White Defendant	.00 (0/3)
Difference	100 points
Ratio	infinite

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[4] The two tables on this page do not display the empty cells for black victim cases, but include one (white defendant) case where the victim's race is unknown.

ii. First Degree Murder Charges and Murder Convictions.

The following tables consider cases in which first degree murder charges resulted in murder convictions, according to various relevant variables.

ALL CASES

RACE OF DEFENDANT AND VICTIM DISPARITIES IN UTAH DEATH SENTENCING RATIOS--FIRST DEGREE MURDER CHARGES RESULTING IN MURDER CONVICTIONS, ALL CASES: SUPPLEMENTED PROSECUTOR'S QUESTIONNAIRE DATA.

	Race of Victim		
Race of Defendant	White Victim	Black Victim	Difference
Black Defendant	.66 (4/6)	.0 (0/2)	66 points
White Defendant	.05 (4/73)	.0 (0/4)	5 points
Difference	***61 points	0	
Ratio	13 to 1	-	

RISK TO OTHERS

RACE OF DEFENDANT AND VICTIM DISPARITIES IN UTAH DEAIH SENTENCING RATIOS--FIRST DEGREE MURDER CHARGES RESULTING IN MURDER CONVICTIONS, CASES INVOLVING APPARENT RISK TO OTHERS: SUPPLEMENTED PROSECUTOR'S QUESTIONNAIRE DATA.

	Race of Victim		
Race of Defendant	White Victim	Black Victim	Difference
Black Defendant	1.00 (2/2)	.0 (0/2)	100 points
White Defendant	.08 (2/26)	.0 (0/2)	8 points
Difference	*92 points	0	
Ratio	12.5 to 1	-	

RISK TO OTHERS AND DEFENDANTS WITH PRIORS

RACE OF DEFENDANT AND VICTIM DISPARITIES IN UTAH DEATH SENTENCING RATIOS--FIRST DEGREE MURDER CASES RESULTING IN MURDER CONVICTIONS, CASES INVOLVING APPARENT RISK TO OTHERS AND DEFENDANT WITH PRIORS: SUPPLEMENTED PROSECUTOR'S QUESTIONNAIRE DATA.

	Race of Victim		
Race of Defendant	White Victim	Black Victim	Difference
Black Defendant	1.00 (1/1)	.0 (0/0)	100 points
White Defendant	.15 (2/13)	.0 (0/1)	15 points
Difference	85 points	0	
Ratio	7 to 1	-	

MULTIPLE VICTIMS

RACE OF DEFENDANT AND VICTIM DISPARITIES IN UTAH DEATH SENTENCING RATIOS--CASES INVOLVING FIRST DEGREE MURDER CHARGES RESULTING IN MURDER CONVICTIONS, MULTIPLE VICTIMS: SUPPLEMENTED PROSECUTOR'S QUESTIONNAIRE DATA.

	Race of Victim		
Race of Defendant	White Victim	Black Victim	Difference
Black Defendant	1.00 (2/2)	.0 (0/1)	100 points
White Defendant	.13 (2/16)	.0 (0/2)	13 points
Difference	*87 points	0	
Ratio	8 to 1	-	

APPARENT TORTURE[5]

RACE OF DEFENDANT AND VICTIM DISPARITIES IN UTAH DEATH SENTENCING RATIOS--CASES INVOLVING FIRST DEGREE MURDER CHARGES RESULTING IN MURDER CONVICTIONS, IN CASES INVOLVING APPARENT TORTURE (y or n): SUPPLEMENTED PROSECUTOR'S QUESTIONNAIRE DATA.

	Race of Victim		
Race of Defendant	White Victim	Black Victim	Difference
Black Defendant	.66 (2/3)	.0 (0/0)	66 points
White Defendant	.11 (1/9)	.0 (0/0)	11 points
Difference	55 points	0	
Ratio	6 to 1	-	

MITIGATING FACTORS

RACE OF DEFENDANT AND VICTIM DISPARITIES IN UTAH DEATH SENTENCING RATIOS--FIRST DEGREE MURDER CASES RESULTING IN MURDER CONVICTIONS, DEFENDANTS UNDER 21 OR NOT THE ACTUAL KILLER: SUPPLEMENTED PROSECUTOR'S QUESTIONNAIRE DATA.

	Race of Victim		
Race of Defendant	White Victim	Black Victim	Difference
Black Defendant	1.00 (1/1)	.0 (0/1)	100 points
White Defendant	.00 (0/37)	.0 (0/3)	0 points
Difference	100 points	0	
Ratio	infinite	-	

5 The number of unknowns in the data on this variable are higher than any other analyzed here.

iii. First Degree Murder Convictions.

The following tables have been compiled considering only first degree murder convictions.

ALL FIRST DEGREE CONVICTIONS

RACE OF DEFENDANT AND VICTIM DISPARITIES IN UTAH DEATH SENTENCING RATIOS, IN CASES INVOLVING FIRST DEGREE MURDER CONVICTIONS: SUPPLEMENTED PROSECUTOR'S QUESTIONNAIRE DATA.

	Race of Victim		
Race of Defendant	White Victim	Black Victim	Difference
Black Defendant	.80 (4/5)	.0 (0/0)	80 points
White Defendant	.11 (4/35)	.0 (0/1)	11 points
Difference	**69 points	0	
Ratio	7 to 1	-	

MULTIPLE VICTIMS

RACE OF DEFENDANT AND VICTIM DISPARITIES IN UTAH DEATH SENTENCING RATIOS, CASES INVOLVING FIRST DEGREE MURDER CONVICTIONS AND MULTIPLE VICTIMS: SUPPLEMENTED PROSECUTOR'S QUESTIONNAIRE DATA.

	Race of Victim		
Race of Defendant	White Victim	Black Victim	Difference
Black Defendant	1.00 (2/2)	.0 (0/0)	100 points
White Defendant	.20 (2/10)	.0 (0/1)	20 points
Difference	80 points	0	
Ratio	5 to 1	-	

DANGER TO OTHERS

RACE OF DEFENDANT AND VICTIM DISPARITIES IN UTAH DEATH SENTENCING RATIOS, CASES INVOLVING APPARENT DANGER TO OTHERS: SUPPLEMENTED PROSECUTOR'S QUESTIONNAIRE DATA.

	Race of Victim		
Race of Defendant	White Victim	Black Victim	Difference
Black Defendant	1.00 (2/2)	.0 (0/0)	100 points
White Defendant	.20 (2/10)	.0 (0/1)	20 points
Difference	80 points	0	
Ratio	5 to 1	-	

APPARENT TORTURE CIRCUMSTANCES

RACE OF DEFENDANT AND VICTIM DISPARITIES IN UTAH DEATH SENTENCING RATIOS, CASES INVOLVING FIRST DEGREE MURDER CONVICTIONS AND APPARENT TORTURE (see Note 5 above): SUPPLEMENTED PROSECUTOR'S QUESTIONNAIRE DATA.

	Race of Victim		
Race of Defendant	White Victim	Black Victim	Difference
Black Defendant	1.00 (2/2)	.0 (0/0)	100 points
White Defendant	.25 (1/4)	.0 (0/0)	0 points
Difference	75 points	0	
Ratio	4 to 1	-	

iv. Reversed Death Sentences.

In all the above tables, only death sentences carried out or presently in force have been included. Cases involving legally erroneous death sentences have not been considered as comparable. The addition of those cases in which death sentences have been imposed and later reversed by the Utah courts for legal error appears to reduce the disparities only slightly, and in most categories does not affect statistical significance.

ALL FIRST DEGREE CHARGES AND FELONY CASES

RACE OF DEFENDANT AND VICTIM DISPARITIES IN UTAH DEATH SENTENCING RATIOS, IN CASES INVOLVING FIRST DEGREE MURDER CHARGES OR FELONY CIRCUMSTANCES, INCLUDING REVERSED DEATH SENTENCES: SUPPLEMENTED PROSECUTOR'S QUESTIONNAIRE DATA.

	Race of Victim		
Race of Defendant	White Victim	Black Victim	Difference
Black Defendant	.50 (4/8)	.0 (0/5)	50 points
White Defendant	.09 (9/103)	.0 (0/4)	9 points
Difference	**41 points	0	
Ratio	5.5 to 1	-	

FIRST DEGREE MURDER CHARGES RESULTING IN MURDER CONVICTION

RACE OF DEFENDANT AND VICTIM DISPARITIES IN UTAH DEATH SENTENCING RATIOS, FIRST DEGREE MURDER CASES RESULTING IN MURDER CONVICTIONS, INCLUDING REVERSED DEATH SENTENCES: SUPPLEMENTED PROSECUTOR'S QUESTIONNAIRE DATA.

	Race of Victim		
Race of Defendant	White Victim	Black Victim	Difference
Black Defendant	.66 (4/6)	.0 (0/2)	66 points
White Defendant	.12 (9/73)	.0 (0/4)	12 points
Difference	**54 points	0	
Ratio	5.5 to 1	-	

FIRST DEGREE MURDER CONVICTIONS

RACE OF DEFENDANT AND VICTIM DISPARITIES IN UTAH DEATH SENTENCING RATIOS, FIRST DEGREE MURDER CONVICTIONS, INCLUDING REVERSED DEATH SENTENCES: SUPPLEMENTED PROSECUTOR'S QUESTIONNAIRE DATA.

	Race of Victim		
Race of Defendant	White Victim	Black Victim	Difference
Black Defendant	.80 (4/5)	.0 (0/0)	80 points
White Defendant	.26 (9/35)	.0 (0/1)	26 points
Difference	*54 points	0	
Ratio	3 to 1	-	

MULTIPLE VICTIMS

RACE OF DEFENDANT AND VICTIM DISPARITIES IN UTAH DEATH SENTENCING RATIOS, FIRST DEGREE MURDER CONVICTIONS INVOLVING MULTIPLE VICTIMS, INCLUDING REVERSED DEATH SENTENCES: SUPPLEMENTED PROSECUTOR'S QUESTIONNAIRE DATA.

	Race of Victim		
Race of Defendant	White Victim	Black Victim	Difference
Black Defendant	1.00 (2/2)	.0 (0/2)	100 points
White Defendant	.30 (3/10)	.0 (0/1)	30 points
Difference	70 points	0	
Ratio	3.3 to 1	-	

4. The Impact of Racial Factors on William Andrews' Case.

In response to the Court's opinion, I sought out and compiled evidence from two sources, by which to measure the level of aggravation in William Andrews' case and determine whether the impact of any racial discrimination in Utah capital sentencing on his case is likely. They are measures of aggravation level developed in studies in other jurisdictions; and comparative Utah homicide cases where no death sentence was imposed on white defendants.

a. The Level of Aggravation of William Andrews' Case According to Aggravation Scales Developed In Other States.

After receiving the Court's opinion, I contacted Professor David Baldus of the University of Iowa Law School, who conducted the study of Georgia capital sentencing referred to by the Court in the McCleskey case. I asked Professor Baldus to calculate the level of aggravation in William Andrews' case, on the same aggravation scale as he did Warren McCleskey's, in the testimony referred to in the Eleventh Circuit opinion. Professor Baldus did so, and informed me that based on that calculation the level of aggravation of William Andrews' case was .39. As I understand it, this calculation reflected the fact that the crime was highly aggravated on several measures (torture of the victims, contemporaneous felonies, and execution-style killings), but the aggravation score was considerably reduced by the fact that the defendant did not personally kill and was not of comparable culpability to his co-perpetrators. A copy of Prof. Baldus'

handwritten notes making these calculations, and the computer program on which they were based, both of which he sent to me at my request, are attached as Exhibit B.

According to Professor Baldus, this score placed William Andrews' case at the seventh level of the aggravation scale he testified on in the McCleskey case. A copy of the exhibit from the McCleskey case setting out racial disparities in death sentencing rates on that scale, from Professor Baldus' research in Georgia, is included in Exhibit B.[6] At Level 7, that Exhibit shows arithmetic discrepancies of 25 points among white victim cases, based on the race of the defendant; and 25 to 39 points, based on the race of the victim, in black defendant cases and in white defendant cases, respectively. Ibid. That table further shows that, it is only at the eighth and highest aggravation level that the racial disparities Professor Baldus found in Georgia disappear.

Professor Baldus also referred me to the work of Professor Arnold Barnett, Some Distribution Patterns for the Georgia Death Sentence, 18 U.CAL.DAV.L.REV. 1327 (1985), for another method of measuring aggravation levels in capital cases. Professor Barnett's data distributes Georgia homicide cases according to three variables: the certainty the defendant is a deliberate killer; the status of the victim; and the heinousness of the killing. See 18 U.C.DAV.L.REV. 1364-1366. Under Prof. Barnett's

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6 This table is also reprinted in McCleskey v. Kemp, 753 F.2d at 922 (Clark, J., dissenting).

scale, it appears that William Andrews' case falls into the category (0, 1, 2). He rates a 0 on the first category, because "it seems clear that the defendant neither ordered the killing nor was the triggerman" and "there is reason to doubt that the defendant's actions in themselves would have caused the victim's death (e.g., (i) the defendant beat the victim, but it was a co-perpetrator's stabbing that killed him...." 18 U.CAL.DAV.L.REV. 1364. It rates a 1 on the defenseless status of the victim, because this was a "stranger to stranger killing...." Id. at 1365. It rates a 2 on the "heinous" scale because "there were at least two homicide victims," "the killing was execution style," and "the physical details of the killing are unusually repulsive...." Id. at 1366. This makes William Andrews' case a "category 3" homicide within Professor Barnett's research, the category in which the greatest disparities based on race were found in Georgia. See id. at 18 U.CAL.DAV.L.REV. 1347-1353.

b. Comparably Aggravated Utah Homicide Cases Where No Death Sentence Was Imposed on White Defendants.

Among the witnesses I would have called at an evidentiary hearing in District Court were experienced criminal lawyers, who could have testified about their knowledge of the Utah criminal justice system, the manner in which serious murder cases are routinely disposed of in the Utah state courts, and the facts of particular aggravated homicide cases involving white defendants in which no death sentence was imposed. Based on my interviews of these individuals, and review of available records, I believe their testimony would have included the following facts regarding

cases where white defendants received prison sentences for highly aggravated murders under the present Utah law:[7]

1. Mark Chandler Austin, convicted in Utah County of cutting his wife's throat, then cutting open her abdomen and removing her unborn child and stabbing it to death. Mr. Austin was permitted to plead to second degree murder and sentenced to prison.

2. Robert Belcher, a prisoner of the Utah State Prison in the Maximum Security Unit, convicted in Salt Lake County in 1978 of killing another inmate by stabbing him 157 times. Mr. Belcher pled guilty to second degree murder.

3. John Michael Calhoun, convicted in Salt Lake City of killing two people during the course of a burglary, in execution style, after tying them up and holding them hostage. (The Utah Attorney General at the time, Robert Hanson, publicly stated that neither Mr. Calhoun nor his co-defendant were appropriate candidates for the death penalty because of their young age; Mr. Calhoun was eighteen, one year younger than Petitioner at the time of this crime. See Reply Brief of Petitioner, Andrews v. Morris, Utah Sup. Ct. No. 18230, p.9.)

4. Joseph Paul Franklin, convicted in Salt Lake County in 1981 of the race-motivated sniper killing of two young black men. Mr. Franklin had a long history of violent, race-motivated attacks on black people. Mr. Franklin was convicted of first degree murder, but given a life sentence by a jury.

5. Steven Kaniewski, convicted in Salt Lake County of first degree murder for shooting a man who had picked him up while hitchhiking, dragging him behind a vehicle, and running over him several times. Mr. Kaniewski was convicted of first degree murder but given a life sentence by a judge.

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7 Some of these cases were among those on which Petitioner submitted affidavits in state court, and requested a hearing. See Petitioner's Brief, Andrews v. Morris, No. 18230 at 13. Others are more recent, and have been compiled during the course of this appeal, and since this Court's opinion.

6. Douglas Edward Kay and Norman Newstead, convicted of three counts of capital homicide and four counts of aggravated robbery, all arising out of the execution-style killing of three persons during a robbery in Cedar City in 1984. Mr. Newstead was convicted of three counts of capital homicide and other crimes and given a life sentence by a Salt Lake Judge. Mr. Kay was permitted to plead guilty in exchange for a life sentence; the prosecution initially withdrew the plea agreement, which resulted in an appeal to the Utah Supreme Court, State v. Kay, 717 P.2d 1294 (Utah 1986). After that appeal, although the state court had approved the withdrawal of the guilty plea, the prosecution elected to go forward with the plea bargain, and Mr. Kay received a life sentence.

7. Dan Lafferty was convicted of two counts of murder in Utah County in 1984, committed during a burglary. Although the killings were brutal, and one of the victims was a child, Mr. Lafferty was given a life sentence by a jury.

8. Heber Norton, convicted in Carbon County in 1981 of two counts of first degree murder during a bank robbery. Mr. Norton had a long criminal record. He was initially sentenced to death, but his death sentence was reversed (because of an instruction identical to that given the jury in Petitioner's case). State v. Norton, 675 P.2d 577 (Utah 1983). On remand, he was sentenced to life imprisonment.

9. Robert Phillips, convicted in 1980 of first degree murder during a robbery in which the victim was killed execution-style. Mr. Phillips had a prior record, but he was sentenced to life in prison by a Salt Lake County judge.

10. Scott Reed was charged in Salt Lake County of one count of first degree murder, for bludgeoning to death an elderly woman during a burglary. Mr. Reed pled guilty to second degree murder and was given a life sentence as part of a plea bargain.

11. John Madison Raines, who was found guilty of first degree murder during the course of a robbery in Salt Lake County. Mr. Raines had a long record of criminal convictions, and was an escapee at the time of the murder, which occurred during the robbery of a drug store. He was convicted of first degree murder, but sentenced to life by a jury.

12. John H. Taylor, convicted in Salt Lake County in 1974 of killing three people after an argument at a restaurant in Salt Lake City. Mr. Taylor was white; at least two of his three victims were black. The jury convicted him of second degree murder and he was sentenced to prison.

13. Julio Valdez, convicted of two counts of capital murder in Salt Lake County in 1983. Mr. Valdez killed the 17 year old mother of his child, and then drowned his 10 month old child. He received a life sentence from a jury.

14. Douglas Yoakum, convicted in Salt Lake County in 1977 of one count of attempted rape and first degree murder. Mr. Yoakum was interrupted during a sexual attack on a young woman by the 68 year old murder victim. Mr. Yoakum proceeded to shoot both the victim, and the young woman; the young woman survived. Mr. Yoakum was convicted of first degree murder, but given a life sentence by a Salt Lake County Judge.

c. Other Utah Death Sentences In Force.

There are two other black men on death row in Utah, Elroy Tillman and Douglas Carter. Both were convicted of single victim felony murders, committed in the course of a burglary.

All three white defendants now on Utah's death row--Don Lafferty, Douglas Bishop, and Ronald Gardner--have been convicted of multiple murders. So was Gary Gilmore, the one man Utah has executed since 1972.

The various relevant aspects of these individuals' cases, to the extent I have been able to learn them, are summarized in the Supplemented Prosecutor's Questionnaire Data (Exhibit A) and on the tables set out above.

CONCLUSION

The information set out above has been compiled under extreme time pressures, in order to present it together with a Petition for Rehearing in this case. It has not been possible to fully confirm, cross-check, and insure the accuracy of all this data and information in the time allowed. Nor has there been time to gather complete, updated information in all these categories. There certainly are numerous cases involving white defendants who have not received the death sentence which are not included in the summaries above.

Although I have no formal training in social science research, I have endeavored to prepare and present the information set out above in a manner consistent with the studies that have been done by social science experts in this area in other states, to the extent I understand them. I have, throughout, consulted with experts who were willing to advise me without payment or formal retainer. The facts set out here are correct to the best of my knowledge and ability to summarize them, and I believe they could be established at any evidentiary hearing on this question the Court allows.

Timothy K. Ford

SUBSCRIBED AND SWORN to before me this _____ day of _____, 1986.

NOTARY PUBLIC in and for the State of Washington, residing at Seattle.

EXHIBIT A

SUMMARY LIST OF SUPPLEMENTED PROSECUTOR'S QUESTIONNAIRE DATA

EXHIBIT A - KEY

The following list contains the data derived from the Supplemented Prosecutor's Questionnaires which has been utilized to construct the tables set out in this affidavit. It shows:

1) The defendant's name

2) The charge (1 = first degree murder; 2 = second degree murder; 3 = lesser crime; 9 equals unknown)

3) Conviction (0 = acquittal; 1 = first degree murder; 2 = second degree murder; 3 = less; 9 = unknown)

4) Defendant's race (W = white; B = black; O = other; / = unknown)

5) The defendant's age: 99 = unknown

6) The defendant's prior record: PRO = property crime; PER = crime against person; PRI = imprisonment for unknown offense; NO = none; / = unknown

7) Victim's race: W = white; B = black; O = other; / = unknown

8) Number of victims

9) Torture circumstances: Y = yes; N = no; M = suggested; / = unknown

10) Felony circumstances: Y = yes; N = no; M = suggested; / = unknown

11) Psychiatric mitigation: Y = yes; N = no; M = suggested; / = unknown

12) Risk to others: Y = yes; N = no; M = suggested; / = unknown

13) The defendant was the actual killer (trig): Y = yes; N = no; M = suggested; / = unknown

14) Sentence: D = death sentence in effect; R = death sentence reversed; blank = other

UTAH MURDER CASES 1973-1985
SUPPLEMENTED PROSECUTORS' QUESTIONAIRES

NAME	CHG	CON	D/R	AGE	REC	V/R	V#	TOR	FEL	PSY	OTH	TRIG	SEN
aarvald	9	0	w	99	/	w	1	/	/	/	/	/	
abeyta	1	2	w	16	/	w	1	m	y	n	n	n	
adams	1	2	/	99	/	w	1	/	/	/	/	/	
alexander	1	2	w	15	pro	w	1	n	y	n	n	y	
allen	1	2	w	17	pro	b	1	n	n	y	n	n	
alvardo	1	0	w	31	per	w	1	n	n	y	n	n	
alvarez	2	2	w	24	pro	/	1	y	n	n	y	n	
andreason	1	2	w	20	/	w	2	n	y	n	n	y	
andreini	1	0	w	35	/	w	1	/	/	/	/	/	
andrews	1	1	b	19	pro	w	3	y	y	n	y	n	d
andrus	2	9	w	56	per	w	1	/	/	/	/	/	
arnold	1	2	w	28	no	w	2	n	n	n	y	y	
austin	2	3	w	20	per	w	1	n	n	n	n	n	
austin	1	2	w	18	no	w	2	/	/	/	y	y	
avila	2	3	w	20	no	w	1	n	n	n	n	y	
azelia	2	3	w	25	/	w	1	n	n	n	n	n	
baker,d	2	3	w	51	/	w	1	/	n	n	n	y	
baker,p	2	3	w	53	/	w	1	/	n	n	n	n	
balderas	1	2	w	55	pro	w	1	n	n	n	y	/	
baldwin	2	3	w	36	no	w	1	n	n	n	n	n	
barcelon	2	0	w	24	per	w	1	n	n	n	n	n	
beck	1	2	w	22	pro	w	1	n	n	n	n	n	
belcher	1	2	w	46	/	w	1	/	n	n	n	n	
beverleigh	1	0	w	35	pri	w	1	/	y	/	/	/	
billington	2	2	w	50	/	w	1	/	/	/	/	/	
bindrup	2	9	w	24	/	w	1	n	n	[illegible]	[illegible]	n	
bishop	1	1	w	30	/	w	5	/	[illegible]	v	n	y	d
blackbeau	2	3	o	34	/	w	1	n	[illegible]	[illegible]	n	n	
boatright	2	3	w	31	/	w	1	n	[illegible]	[illegible]	y	n	
bolsinger	2	2	w	22	/	w	1	n	y	n	n	n	
boren	2	3	w	23	no	w	1	n	n	n	n	n	
bradford	2	3	b	27	per	b	1	/	/	/	/	/	
bradley	1	2	w	23	/	w	1	n	n	n	n	n	
bramwell	2	0	w	44	no	w	1	n	n	n	y	n	
brewer	1	2	w	23	/	w	2	n	y	n	n	y	
brooks	1	2	w	22	/	w	1	n	y	/	n	y	
brown	2	3	w	18	pro	w	1	/	/	y	/	/	
brown,g	1	1	w	37	/	w	1	n	/	n	n	y	
brown,j	1	1	w	25	per	w	2	n	y	n	y	y	r
brown,l	2	3	w	68	/	w	1	n	n	y	n	n	
butler	2	3	w	35	/	w	1	/	/	/	/	/	
butterfiel	9	9	/	99	/	o	1	n	n	y	/	n	
caffal	1	2	w	18	/	w	1	n	n	n	y	n	
calhoun	1	1	w	18	/	w	2	n	y	n	n	y	
carpenter	1	0	b	18	no	w	1	n	n	n	n	y	
carter	1	1	b	30	/	w	1	n	y	n	n	y	d
chavez,j.	2	3	w	43	/	w	1	n	n	n	n	n	
chavez,r	2	0	w	99	/	/	1	y	n	n	n	/	
chester	2	3	w	62	/	w	1	n	n	y	n	n	
chidester	3	9	/	99	/	w	1	/	/	/	/	/	

UTAH MURDER CASES 1973-1985
SUPPLEMENTED PROSECUTORS' QUESTIONAIRES

NAME	CHG	CON	D/R	AGE	REC	V/R	V#	TOR	FEL	PSY	OTH	TRIG	SEN
christian	1	9	w	23	pri	w	1	/	/	/	/	/	
christophe	2	0	w	26	no	w	4	n	y	y	y	n	
clayton	9	9	/	99	/	/	1	/	/	/	/	/	
codianna	1	1	w	21	no	w	1	n	y	n	n	y	r
coleman	1	3	b	29	per	b	1	n	y	y	/	/	
collier	1	2	w	38	pro	w	1	n	n	n	n	y	
coney	2	3	b	18	no	b	1	n	n	y	n	y	
cooper	3	3	w	22	/	w	1	/	/	/	/	/	
coy	1	0	w	31	per	w	1	/	/	/	/	/	
craig	2	2	w	45	pro	w	2	n	y	y	y	n	
crane	2	3	w	25	no	w	1	n	n	y	n	n	
crossdale	1	9	w	30	pro	w	1	n	y	y	n	n	
davidson	2	3	w	44	/	w	1	n	n	y	n	y	
defde	2	2	b	19	per	b	1	n	n	n	n	y	
dehart	2	3	/	29	no	w	1	/	n	n	n	/	
deifert	1	2	w	40	/	/	1	/	/	/	/	/	
dends	2	2	w	21	no	w	1	n	n	y	n	n	
dixon	9	9	/	99	/	w	1	/	/	/	/	/	
dodge	2	3	w	23	/	w	1	/	/	/	/	/	
douglas	2	3	w	33	per	/	1	n	n	y	n	n	
downey	3	3	w	25	/	w	1	/	n	y	n	n	
dronzank	2	2	w	47	/	/	1	n	y	n	n	n	
druan	2	2	w	99	/	w	1	/	/	/	/	/	
dunn	1	2	w	30	per	w	1	n	y	n	n	n	
dunsdon	1	1	w	30	pro	w	1	n	y	n	n	y	r
dupre	2	3	w	48	no	w	1	/	/	y	/	/	
duran	1	2	w	18	per	b	1	n	n	n	/	/	
earl	1	0	w	25	/	w	2	n	n	n	y	n	
eastwood	1	2	w	30	/	w	1	/	y	/	/	n	
eldridge	1	2	w	26	pro	w	1	n	n	n	y	n	
eloylopes	9	9	w	36	/	w	1	/	/	/	/	/	
ervin	2	3	b	24	ro	w	1	n	n	n	n	n	
evanson	1	2	w	20	pro	w	1	n	n	y	n	n	
faingaanak	2	0	o	29	no	o	1	n	n	/	y	/	
farrow	2	3	b	49	/	b	1	n	n	n	n	n	
felsen	3	3	w	21	no	w	1	n	/	n	/	n	
fontana	2	2	w	28	per	w	1	n	n	n	n	n	
fontayne	1	0	b	32	/	b	1	/	/	y	/	/	
foote	2	3	w	35	/	w	1	/	/	/	/	/	
franklin	1	1	w	27	per	b	2	n	n	n	y	y	
galegas	2	3	w	30	no	w	1	n	n	y	n	n	
galego,l	2	3	w	40	no	w	1	n	n	n	n	n	
gardner	1	1	w	22	per	w	1	n	y	/	y	y	d
gardunio	1	2	w	25	/	w	1	/	/	/	/	/	
gaxiola	1	2	w	35	pro	w	1	m	y	m	y	m	
gibson	2	3	w	60	no	b	1	n	n	n	m	n	
gibson	2	2	w	28	/	w	1	/	/	/	/	/	
gilmore	1	1	w	35	per	w	1	n	y	n	y	y	d
gonzales	2	2	w	38	per	i	1	n	n	y	n	y	
gorman	2	3	w	42	per	w	1	/	y	/	/	/	

UTAH MURDER CASES 1973-1985
SUPPLEMENTED PROSECUTORS' QUESTIONAIRES

NAME	CHG	CON	D/R	AGE	REC	V/R	V#	TOR	FEL	PSY	OTH	TRIG	SEN	
goss	2	3	w	54	per	o	1	/	/	y	n	n		
graves	1	9	/	99	/	/	1	/	/	/	/	/		
griggs	1	0	w	70	no	w	1	n	/	/	/	/		
grueber	2	3	w	18	/	w	1	/	/	/	/	/		
gurule,t	1	2	w	28	pri	w	1	/	/	/	/	/		
hales	2	3	w	28	per	w	1	/	/	/	/	/		
hallet	3	3	w	19	no	w	1	n	n	n	/	n		
hansen	2	3	w	23	/	w	1	/	/	/	/	/		
harding	1	2	w	44	/	w	1	y	y	n	n	n		
hardy	1	1	w	28	per	w	1	n	y	y	n	y		
harris	2	3	b	25	no	w	1	n	n	n	n	n		
hayes	3	3	w	27	per	w	1	n	/	y	/	n		
henderson	2	2	w	18	per	w	1	/	y	n	/	n		
henline	2	9	/	25	pro	w	1	/	/	/	/	/		
hernandez	2	9	w	99	/	/	1	/	/	/	/	/		
howard	1	2	w	20	no	w	2	n	n	n	n	n		
howell	2	3	w	32	per	w	1	n	n	n	y	y		
huntley	1	2	w	28	pro	w	1	n	y	n	n	y		
huston	1	2	w	27	pro	w	1	n	y	y	/	/		
jarvis	2	9	w	26	/	w	1	/	/	/	/	/		
jewell	2	9	b	35	/	b	1	/	/	/	/	/		
johann	1	2	w	30	/	w	1	/	/	/	/	/		
johnson	1	2	b	27	no	b	1	n	n	n	y	y		
johnson	2	9	w	28	/	w	1	/	/	/	/	/		
johnson	3	3	w	29	/	w	1	n	n	y	n	n		
kanieuski	1	1	w	22	no	w	1	n	y	y	y	y		
kay,d	1	1	w	99	/	w	3	/	y	n	y	y		
kelly	1	1	b	99	no	w	1	n	y	n	n	y		
ketterer	2	3	w	25	/	w	1	/	/	/	/	/		
kichol	2	3	o	20	pro	o	1	/	/	/	/	/		
kingston	3	0	w	54	no	w	1	n	n	/	/	/		
lafferty	1	1	w	43	per	w	2	y	y	y	n	y		d
laffertyda	1	1	w	99	/	w	2	y	y	y	n	n		
lancaster	1	2	w	33	per	w	1	/	y	n	n	n		
lebaron	1	1	w	54	per	w	1	n	n	n	y	n		
lee	2	9	/	99	/	/	1	/	/	/	/	/		
leonard	2	3	b	32	/	b	1	/	/	/	/	/		
lester	2	3	w	29	/	/	1	/	/	/	/	/		
levgas	1	0	w	28	/	w	1	/	/	/	/	/		
lind	2	9	o	25	/	o	1	n	n	/	y	/		
lindquist	2	0	w	38	/	w	1	/	/	/	/	/		
lindsey	3	0	/	99	/	w	1	/	/	/	/	/		
lindstrom	2	3	w	35	/	w	1	/	/	/	/	/		
lopez	2	2	w	99	/	/	1	y	/	/	/	y		
losh	2	9	/	12	no	w	5	n	/	/	/	/		
maestas	1	2	w	28	per	w	1	n	n	n	n	y		
malek	2	3	w	23	/	w	1	/	/	n	/	y		
manuel	2	3	b	45	per	w	1	n	n	n	n	y		
marsden	2	3	w	36	/	w	1	n	n	/	/	n		
marston	1	0	w	22	/	w	1	/	/	/	/	/		

UTAH MURDER CASES 1973-1985
SUPPLEMENTED PROSECUTORS' QUESTIONAIRES

NAME	CHG	CON	D/R	AGE	REC	V/R	V#	TOR	FEL	PSY	OTH	TRIG	SEN
martinez	2	0	w	26	no	o	1	n	y	n	y	y	
martinez	1	2	w	27	/	w	1	n	y	y	n	y	
marvel	1	1	w	25	pro	w	1	n	y	n	n	y	r
massburg	2	3	w	19	/	w	1	n	n	y	n	n	
matelau	2	3	o	29	no	o	1	n	n	n	y	n	
maxley	2	3	w	24	per	w	1	/	/	y	/	n	
miller	1	1	w	15	no	w	1	/	y	n	m	y	
minnish	2	9	w	37	/	w	1	/	/	/	/	/	
minter	2	3	w	49	no	w	1	n	n	n	n	n	
mitchell	1	1	w	99	/	w	1	n	y	/	n	y	
mitcheson	2	2	w	99	/	w	1	/	/	/	/	/	
monroya	2	3	/	23	per	w	1	/	/	/	/	/	
morales	2	2	w	26	/	w	1	n	n	n	/	y	
morefield	2	3	w	27	no	w	1	/	/	/	/	/	
mouritsen	2	3	w	18	pro	w	1	n	n	/	/	n	
namds	2	0	w	33	/	w	1	/	/	/	/	/	
nash	1	2	w	65	per	w	1	n	h	h	n	n	
nelson	1	1	w	99	per	w	1	y	y	/	n	y	
newstead	1	1	w	99	per	w	3	/	y	/	/	y	
nicholson	2	2	w	21	/	w	1	n	n	n	n	n	
nisonger	1	0	w	35	per	w	1	/	y	/	/	/	
nordgren	2	3	w	35	pro	w	1	/	/	/	/	/	
northern	1	1	w	17	pro	w	1	n	y	n	n	n	
norton	1	1	w	72	per	w	2	n	y	y	n	y	
pastillas	2	2	w	31	/	w	1	n	n	n	y	y	
payne	2	2	w	26	pro	w	1	/	/	/	/	/	
pendleton	2	3	b	54	/	w	1	n	n	n	n	n	
penzari	9	0	w	23	no	w	1	n	n	/	/	/	
perez	1	1	w	16	pro	w	1	n	y	n	n	n	
perryman	2	3	w	67	pro	/	1	/	/	/	/	/	
petree	1	2	w	15	pro	w	1	n	m	n	n	y	
phillips	1	1	w	26	pro	w	1	n	y	n	n	y	
pierre	1	1	b	21	no	w	3	y	y	n	y	y	d
pikwait	2	9	o	24	/	o	1	/	/	/	/	/	
pikyairt	2	9	o	25	/	o	1	/	/	/	/	/	
potter	1	9	w	18	/	w	1	m	n	n	n	y	
proud	1	9	w	29	pro	w	1	/	n	n	/	/	
pugh	1	9	b	27	pro	b	1	/	/	/	/	/	
rackhaun	2	0	w	39	no	w	1	/	/	/	/	/	
rainer	1	1	w	30	per	w	1	n	y	n	n	y	
redford	2	3	w	56	/	w	1	n	n	y	y	y	
reed,s	1	1	w	99	/	/	1	/	y	y	/	y	
renteria	1	0	w	25	/	w	1	n	n	n	y	/	
reyna	2	3	w	37	per	w	1	n	n	y	n	n	
richardson	2	3	w	25	/	w	1	n	/	/	n	/	
ried	1	2	w	28	/	w	1	m	n	n	y	n	
roberts	1	3	b	99	no	w	3	y	y	n	y	n	
rodriguez	1	9	w	22	pri	w	1	/	/	/	/	/	
rogers	9	9	w	77	no	w	1	/	/	/	/	/	
rogers	2	3	w	60	/	w	1	/	/	/	n	/	

UTAH MURDER CASES 1973-1985
SUPPLEMENTED PROSECUTORS' QUESTIONAIRES

NAME	CHG	CON	D/R	AGE	REC	V/R	V#	TOR	FEL	PSY	OTH	TRIG	SEN
romero	2	3	w	34	pro	w	1	/	/	/	y	/	
roseland	1	0	w	25	/	w	2	n	n	n	y	n	
rucetta	2	3	w	46	no	w	1	/	/	y	y	n	
ruch	3	3	w	17	/	w	1	n	y	n	m	n	
russel	1	9	w	35	no	/	2	m	n	y	m	n	
sanchez,c	1	2	w	30	per	w	1	n	n	n	y	/	
sanchez,k	1	2	w	18	/	w	1	/	/	/	/	/	
santaw	2	9	/	34	/	/	1	/	/	/	/	/	
schoenfiel	2	3	w	20	/	w	1	n	y	m	m	y	
schreuderf	1	1	w	50	no	w	1	n	n	n	n	n	
schreuderm	1	2	w	19	no	w	1	n	n	y	n	y	
schuman	2	2	w	25	/	w	1	/	/	/	/	/	
schwartz	2	3	/	99	/	/	1	/	/	/	/	/	
scott,h	1	2	b	31	per	w	1	m	y	n	n	y	
scott,s	1	2	b	29	/	b	2	n	y	y	m	/	
sensarnie	2	3	w	39	/	w	1	/	y	/	y	y	
sessions	2	3	w	24	pro	w	1	n	n	/	n	/	
shaffer,d	1	1	w	99	pro	w	1	/	y	/	/	y	
sharmberg	2	9	w	29	/	w	1	/	/	/	/	/	
shuffield	1	2	w	22	per	w	1	/	/	/	m	y	
siebert	2	3	w	24	/	w	1	/	/	y	/	n	
simmons	2	3	w	34	/	w	1	n	n	n	n	n	
snack	2	3	w	24	no	w	1	/	/	/	/	/	
smith	1	9	w	30	per	w	1	n	n	n	n	n	
smith	1	1	w	40	/	w	1	/	y	/	m	y	
smith,r	2	2	/	99	/	w	1	/	/	/	/	/	
snow	2	3	o	23	pro	w	1	m	n	m	/	y	
st.julian	2	0	w	22	/	b	1	n	n	/	n	/	
stack	1	1	w	18	pro	w	1	n	n	n	n	y	
stadat	2	0	o	35	/	w	1	/	/	/	/	/	
starkey,g	2	3	/	35	/	w	1	/	/	y	/	/	
starks	3	3	w	25	/	w	1	/	/	/	/	/	
starky,s	2	3	w	22	/	w	1	/	/	/	/	/	
stewart	2	3	w	24	/	w	1	/	/	/	/	/	
strandrod	1	1	w	27	pro	w	2	n	n	n	y	y	
strom	2	0	w	32	no	w	1	/	/	/	/	/	
summarell	1	2	w	21	pri	w	1	/	y	/	y	y	
taiese	2	3	o	27	/	o	1	n	n	n	y	n	
tanner	2	3	w	25	/	w	1	/	/	/	/	/	
taylor	1	2	w	99	/	b	3	n	y	y	y	n	
tena	2	2	w	99	/	w	1	/	/	/	/	/	
thomas	2	3	/	99	/	/	1	/	/	/	/	/	
thomas	2	9	w	56	no	w	1	/	/	/	/	/	
tillman	1	1	b	46	pri	w	1	n	y	n	n	y	d
toledo	2	3	/	20	/	w	1	n	n	n	n	n	
torres	2	0	w	23	pro	w	1	/	/	/	/	/	
torres,i	2	3	w	26	/	w	1	n	n	n	n	n	
trujillo	2	3	w	27	/	w	1	n	n	y	n	y	
tuttle	1	1	w	99	/	w	1	/	y	n	n	y	
uribe	2	3	w	37	no	w	1	n	n	y	n	n	

UTAH MURDER CASES 1973-1985
SUPPLEMENTED PROSECUTORS' QUESTIONAIRES

NAME	CHG	CON	D/R	AGE	REC	V/R	V#	TOR	FEL	PSY	OTH	TRIG	SEN
vaenuku	9	3	o	32	no	o	1	n	n	y	m	n	
valdez	2	3	w	36	no	b	1	n	n	n	n	n	
valdez,j	1	1	w	99	/	w	2	/	/	/	n	y	
vigil,a	2	3	w	23	/	w	1	/	/	/	/	/	
vigil,b	2	3	w	31	/	w	1	n	n	m	n	y	
vigil,r	2	3	w	22	pro	w	1	n	n	y	n	y	
walker,t	1	1	w	99	/	w	1	n	y	n	y	y	
wallace,l	2	2	w	33	/	w	1	/	/	/	/	/	
wallace,r	2	3	w	99	/	/	1	n	n	n	n	n	
ward	1	2	w	33	/	w	1	n	y	n	/	/	
wardle	2	2	w	50	/	w	1	n	n	m	n	n	
warner	1	2	w	22	no	w	1	n	y	/	n	n	
washburn,c	1	9	w	23	no	w	1	/	y	/	/	/	
washburn,c	1	9	w	20	per	w	1	/	y	/	/	/	
wauneka	2	3	o	36	per	o	1	m	n	y	n	n	
webb	1	2	w	16	no	w	2	n	y	n	n	y	
wellwood	1	9	w	30	pri	w	1	/	/	/	/	/	
whatley	2	3	b	37	/	w	1	/	/	y	/	/	
white	3	0	w	35	/	w	1	/	/	y	/	y	
white	1	9	w	27	/	w	1	/	n	n	/	/	
williams	1	2	/	25	/	w	1	n	y	n	n	n	
wilson	2	2	w	65	/	w	1	/	/	/	/	/	
wood	1	1	w	38	no	w	1	n	y	/	n	y	r
wulfenstei	1	0	w	21	per	w	1	/	/	/	/	y	
yoakum	1	1	w	27	no	w	1	y	y	y	y	y	

EXHIBIT B

NOTES OF PROF. DAVID BALDUS CALCULATING
AGGRAVATION LEVEL IN WILLIAM ANDREWS' CASE
AND COMPUTER PROGRAM ON WHICH NOTES WERE BASED

1) Bobbitt vs Camp — Andrews under DPMR10X3 (t=.39)
HISOIDX2 (7)
↳ which includes DB90+91

NO Conduct	—	Impeus Mutco Capacity
No Kell	-.07	
Recc Mat	—	
Averse	—	
Inarrat	—	
Kidnap	—	
Tortius	Yes .24	
D.P. Sec		
DTBTEXP	(5X.03) .15	→ B2, B3, B4 + 2 B7 factors
⇒ AGGFCX	(2X.03) .06	— Tortius + Execution Style Killing
⇒ MANAGGFCX	—	
Immodest	—	
⇒ CPLESSFN LOF???	(.08)	
DEFARMIT	—	
Extended	(1X.01) .01	
Total	.39	→ .38 → .39 → level 7 of DB90

IDwitness ✓(present)
Pretrial ID
Confess
CO Stat
Med Repat
Tortius re prep

Copop

Not included
Aggravat
of comparable
culpability

```
: LDP      TASK     B   S.U. ACADEMIC COMPUTING CENTER VM/SP

SE IF .465 =< DTHSNIDA < .49 THEN HI500JRX = 2 ;
SE IF .49 =< DTHSNIDA < .54 THEN HI500JRX = 3 ;
SE IF .54 =< DTHSNIDA < .60 THEN HI500JRX = 4 ;
SE IF .60 =< DTHSNIDA < .69 THEN HI500JRX = 5 ;
SE IF .69 =< DTHSNIDA < .79 THEN HI500JRX = 6 ;
SE IF .79 =< DTHSNIDA < .96 THEN HI500JRX = 7 ;
SE IF DTHSNIDA >= .96 THEN HI500JRX = 8 ;
' ;
IDX3 = NOCONDUC * -.46 + NOKILL * -.07 + RACEMOT * .08 +
VENGE * .48 + INSMOT * .14 + KIDNAP * .16 + TORTURE * .24 +
PLEAS * .23 + LDFB7EXP * .03 + MAJAGFCX * .03 + MINAGFCX * .01 +
INSANDEF * .12 + CPLESSEN * -.08 + DEFADMIT * -.07 + EVIDINDX * .01 ;
PMRIDX3 < .15 THEN HI5OIDX2 = 0 ;
SE IF .15=<DPMRIDX3 < .16 THEN HI5OIDX2 = 1 ;
LSE IF .16 =< DPMRIDX3 < .17 THEN HI5OIDX2 = 2 ;
SE IF .17 =< DPMRIDX3 < .20 THEN HI5OIDX2 = 3 ;
SE IF .20 =< DPMRIDX3 < .23 THEN HI5OIDX2 = 4 ;
LSE IF .23 =< DPMRIDX3 < .27 THEN HI5OIDX2 = 5 ;
LSE IF .27 =< DPMRIDX3 < .33 THEN HI5OIDX2 = 6 ;
LSE IF .33 =< DPMRIDX3 < .44 THEN HI5OIDX2 = 7 ;
LSE IF DPMRIDX3 >= .44 THEN HI5OIDX2 = 8 ;
ND ;
MRIDY=DPMURIDT ;
:PMURIDY = 1 & LDF44 ~= 1 THEN DPMURIDY = 0 ;
AL DTHSNIDA=DTH SNT AT PEN TR INDEX AGE/MIT EV FT AL
UIDX2=TOP 500 CASES REV DPMURIDT IDX
  DPMRIDX3=DP IF INDICT INDEX EVID FACT
   DSNIDXLA=INDEX FOR DEATHSNT/LOG REGRESS ALL
   HI500LGX=SCALE OF TOP 500 CASES ON DPMIDXL3
   HI500JLGX=SCALE OF TOP 500 CASES ON DSNIDXLA
   HI500JRX=SCALE OF TOP 500 CASES ON DTHSNIDA
  DPMURIDY=RECODED DPMURIDT WITH LDF44;
IDXLM = -2.950 + (-.887)*BLVICMOD + (-1.569)*MITDFFN + (1.33)*RESBKIN
-1.432)*SMUNDRIG + (.889)*LDFESUM + (.588)*MAJAGFCX
-1.340)*JOINTKIL + (-2.313)*VBLUSKL + (.974)*STRANGER
.261)*EVIDINDX + (1.963)*DEADFACT;
RIDM = -.12 + (.10)*LDFB4 + (-.27)*SMUNDRIG + (.10)*LDFESUM + (.11)*BEAT
     + (.13)*MULSTAB + (.07)*MAJAGFCX + (.56)*CPLESSEN + (-.27)*JOINTKIL
     + (-.53)*NOCCNDUC + (-.21)*VBLUSKL + (.11)*VHISTAT + (-.43)*VINJFEAR
     + (.16)*STRANGER + (-.09)*DISFIGHT + (-.12)*IDWITCOP + (.05)*EVIDINDX
     + (.24)*DEADFACT;
SNIDM = -.02 + (-.49)*DEFFEAR + (.13)*EXECUT + (.03)*MINAGFCX
     + (-.16)*DPGHIS + (-.61)*MITMOTVE + (.51)*MADLOVER + (.35)*INSMOT
     + (.14)*NONPROPC + (.06)*MAJAGFCX + (.01)*DPSTCRIM + (-.52)*CPLESSEN
     + (.26)*INSANDEF + (-.31)*NOSPAGCM + (.32)*PANIC + (.06)*EVIDINDX;
DTNSNIDM < .15 THEN DSENSCAM = 1 ;
LSE IF .15=<DTNSNIDM<.31 THEN DSENSCAM = 2 ;
LSE IF .31=<DTNSNIDM<.47 THEN DSENSCAM = 3 ;
LSE IF .47=<DTNSNIDM<.59 THEN DSENSCAM = 4 ;
LSE IF .59=<DTNSNIDM<.695 THEN DSENSCAM = 5 ;
LSE IF .695=<DTNSNIDM<.85 THEN DSENSCAM = 6 ;
LSE IF .85=<DTNSNIDM<1.00 THEN DSENSCAM = 7 ;
LSE IF DTNSNIDM >= 1.00 THEN DSENSCAM = 8 ;
PTRIDXLM < -.794 THEN H7PRLGSL = 0 ;
LSE IF -.794 =< PTRIDXLM < -.389 THEN H7PRLGSL = 1 ;
```

DB 90

Table 42

RACE OF VICTIM DISPARITIES IN DEATH SENTENCING RATES WHEN DEFENDANTS INDICTED FOR MURDER CONTROLLING FOR THE PREDICTED LIKELIHOOD OF A DEATH SENTENCE AND THE RACE OF THE VICTIM 1/

A	B	C	D	E	F	G	H	I	J
Predicted Chance of of a Death Sentence (Decile) to 8 Decimals	Average Actual Sentencing Rate for the Cases at Each Level	Death Sentencing Rates for Black Defendants Involving: White Victim Cases	Black Victim Cases	Arithmetic Difference in Race of the Victim Rates (Col C-Col D)	Ratio of Race of the Victim Rates (Col C/Col D)	Death Sentencing Rates for White Defendant Involving: White Victim Cases	Black Victim Cases	Arithmetic Difference in Race of the Victim Rates (Col G-Col H)	Ratio of Race of the Victim Rates (Col G/Col H)
1	.0 (0/35)	.0 (0/9)	.0 (0/19)	.0	0	.0 (0/5)	-	-	-
2	.0 (0/55)	.0 (0/8)	.0 (0/27)	.0	0	.0 (0/19)	.0 (0/11)	.0	0
3	.08 (6/76)	.30 (3/10)	.11 (2/18)	.19	2.73	.03 (1/39)	.0 (0/9)	.03	0
4	.07 (4/57)	.23 (3/13)	.0 (0/15)	.23	-	.04 (1/29)	-	-	-
5	.27 (15/55)	.35 (9/26)	.17 (2/12)	.18	2.06	.20 (4/20)	-	-	-
6	.17 (11/64)	.38 (3/8)	.05 (1/20)	.33	7.60	.16 (5/32)	.50 (2/4)	-.34	.32
7	.41 (29/71)	.64 (9/14)	.39 (5/13)	.25	1.64	.39 (15/39)	.0 (0/5)	.39	0
8	.88 (51/58)	.91 (20/22)	.75 (6/8)	.16	1.21	.89 (25/28)	-	-	-

1/ The overall race of victim disparity estimated with a logistic coefficient measure was 1.31 (with a death odds multiplier of 3.71 statistically significant at the .01 level (adjusted R^2 was 10.56). These results were produced with the procedure described in Appendix G, Part IV. The overall race of victim measure comparable to a least squares regression coefficient is .06.